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# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT.

AMERICAN-PACIFIC CONSTRUCTION  
COMPANY, a Corporation,  
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COM-  
PANY, a Corporation,  
Defendant in Error.

No. 2272

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### REPLY BRIEF FOR DEFENDANT IN ERROR.

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St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

**FILED**

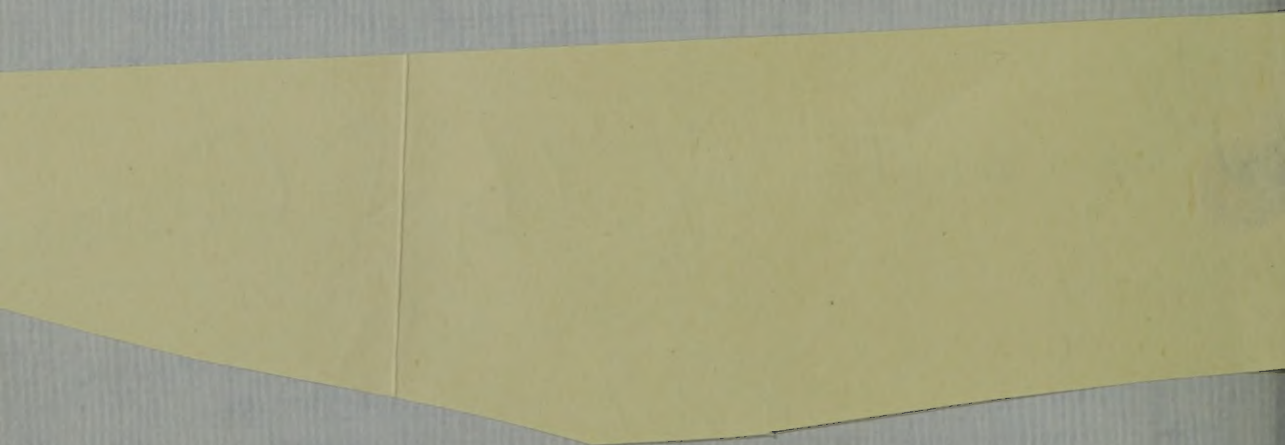
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## REPLY BRIEF FOR DEFENDANT IN ERROR.

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It is not the purpose to rewrite the original brief for the Modern Steel Structural Co., because as prepared and filed that brief, it is believed, covers every issue of law involved in the case. It is only the purpose of this brief to manifest palpable errors contained in the elaborate posthumous brief of counsel for the plaintiff in error. The original brief for the defendant in error was in the main prepared without having seen the original brief of plaintiff in error. We understood that counsel for plaintiff in error obtained leave to file a reply brief—not to recast his entire original brief, elaborating and extending it so as to cover 159 pages.



## POINT I.

The contention of counsel for plaintiff in error that there never existed a valid contract, nor any contract between plaintiff in error and defendant in error as to the structural steel in question is untenable.

No doubt this court will have read the original brief for defendant in error before reading this, and will therefore be advised why, in the first instance, evidence of the loss by defendant in error of its duplicate of the original contract, and evidence of the search to find same and evidence of its contents, were introduced in evidence.

Late in the trial plaintiff in error finally complied with the request of defendant in error made at the beginning of the trial to produce its duplicate copy of the original contract (a thing it should have done at that time), and the same was offered in evidence without objection by plaintiff in error. When this occurred then all previous testimony relating to the loss of the original duplicate, search for it, and its contents, became immaterial. This duplicate of the original contract consists of a written proposition made by the defendant in error, dated Waukesha, Wisconsin, Jan. 4, 1907, and thereafter duly executed by the plaintiff in error and approved by the officers of the defendant in error in January, 1907, at which date it became a valid contract (Rec., p. 194).

By this contract defendant in error proposed to the plaintiff in error to furnish to it **“in good order the following described structural material, constructed in a workmanlike manner, described as follows,** and in accordance with the drawings furnished by Jos. D. Smedberg, and specifications also furnished by J. D. Smedberg, identified with marks: ‘Copy No. 1,’ ini-

tialed 'S. B. H. 12.30.06,' excepting as noted under 'REMARKS' on sheet No. 2 attached."

(The marked copy of specifications remained with plaintiff in error, but the carbon copy, or duplicate, was delivered by plaintiff in error to defendant in error, and in accordance with which the contract was being carried out until breached by plaintiff in error [Rec., pp. 104-5].)

"Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location—southeast corner of Van Ness and Geary streets, San Francisco, Cal.

"Delivery as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

"Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

"REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION,' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

"Mill Test Reports, within said specifications, are proposed, as being satisfactory in the above



respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

“We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American Pacific Construction Company, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American Pacific Construction Company the amount overpaid us.

“Price to be seventy-seven dollars (\$77.00) per ton; freight allowed to San Francisco, Cal. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg or his authorized agent.

“Terms of payment as follows: 30 days net cash from date of invoices.

“Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

“We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

“It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company, by any terms, stipulations or conditions not herein expressed.

“This proposition is for immediate acceptance,

but although accepted, does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

“In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have power to name an uninterested umpire, whose decision shall be binding on all parties to the contract.

Ship via:

MODERN STEEL STRUCTURAL CO.

Accepted Jany. 17th, 1907, by S. B. H.

Approved by S. B. HARDING, *Pres.*

AMERICAN-PACIFIC CONSTRUCTION CO.,

THOMAS VIGUS,

*General Manager.*”

The defendant in error also put in evidence the general specifications for the structural steel and iron work for the building in question, consisting of 19 pages, being the same specifications plaintiff in error delivered to the defendant in error under which steel was to be gotten out (Rec., pp. 104-5-6-124). These specifications were prepared by Jos. D. Smedberg, Consulting Engineer, San Francisco, the engineer for the steel and iron work for the building (Rec., pp. 104-105). These are a duplicate of the original marked “Copy No. 1,” initialed “S. B. H. 12-30-06,” and were so treated by parties to the contract at all times. The marked copy remaining with the plaintiff in error.



## SPECIFICATIONS.

These specifications in part read as follows: **“The Structural Steel and Iron of an Eight Story Office Building Theatre to be erected on the southeast corner of Van Ness and Geary streets, for The Richelieu Realty Syndicate, San Francisco, Frank T. Shea, Architect, San Francisco, Jos. D. Smedberg, Consulting Engineer, San Francisco.**

**“Mr. Joseph D. Smedberg, the Consulting Engineer, is under contract with Mr. Frank T. Shea, Architect, to furnish those parts of the plans and specifications for the building which relate to the iron and steel frame and reinforced concrete work.**

**“He is also under contract with The Richelieu Realty Syndicate to supervise the inspection, to superintend the erection of the steel frame work, to check all bills rendered by the contractors for this portion of the work, and, in general, to see that all the contracts relating to this part of the building are faithfully fulfilled. The contract for the iron and steel work will be let on a pound basis erected.**

**“A separate set of specifications were prepared for the use of the computers and draftsmen in preparing detail plans.**

### **“GENERAL:**

**“The steel construction described in these specifications is that for a new office building and theatre, southeast corner of Van Ness avenue and Geary street, San Francisco, Cal. The building is in plan 149 feet x 120 feet, and is eight stories high above the sidewalk, with basement extending 20 feet 3 inches below ground (Datum).**

**“The plan of construction is as follows:**

**“The general plans for the theatre portion of**

the building being incomplete still, the intention is to erect the office building portion first and especially rush work on the first section columns, first and second story beams and girders for connecting theatre catilevers, etc., will be drilled in the field, as arrangement of theatre framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction, due to lack of information regarding connection.

“The contract for grillage beams and cast-iron pedestals will be made separately in order to have foundations ready for first delivery of steel work, and cause no delay in the erection of frame.

#### “SPECIFICATIONS EXPLAINED:

“These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building between The American Pacific Construction Company, parties of the first part, and Richelieu Realty Syndicate, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

“These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the Architect, and those furnished by the Engineer, as hereinafter specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. **The contractor will understand that the steel construction herein described is also to be complete, in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand**



the construction, and to fully inform himself in regard to any points that he may not clearly understand, for what is herein intended to be described, viz.:

“When necessary or desirable, he must apply to the Architect, or the Engineer, for further details or specifications during construction or before proceeding with his work.

#### “REQUIREMENTS OUTLINED:

“This contractor must furnish and set all the iron and steel shown or referred to in these specifications and called for by the said drawings hereinbefore referred to, and when the erection is completed, he must remove all the materials used in performing the work. He must furnish in all cases the exact sections, weights and kinds of material that is called for, or those of approved equivalent strength, and he must follow exact details, methods and instructions called for by these specifications and said drawings. **He must set the iron work as fast as may be considered practical in the judgment of the engineer, always keeping at least one story in advance of the masonry.** He will be expected to give this work his personal supervision, or have a man at all times to take care of it.

#### “DRAWINGS:

“The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the engineer.

“The sections given are those of the Carnegie Steel Company’s manufacture. In general, these drawings are made to scale, but scale dimensions must never be used. These drawings, together with these specifications, are the property of the architect, to whom all copies must be returned on

the completion of the work. Detail or shop drawings required by the contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture, finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the engineer.

“Blue prints of the shop drawings, lists and schedules, as many copies of each as are necessary, but not more than five, will be furnished to the contractor for his use in the manufacture of the material. Another complete set of these prints, together with one complete set of prints of the erection drawings, will be furnished to the contractor for use in erection. One complete set of all the drawings, plans, list and schedules will be furnished to the inspector. All the above-mentioned prints will be furnished by the architect free of expense. Additional prints of any of these drawings may be taken by said contractor or inspector, if desired, at their own expense, but originals taken from the office for that purpose must be promptly returned.

#### “BUILDING LAWS:

“This contractor must comply with all the municipal or corporation ordinances and the laws and regulations relating to buildings in the City of San Francisco, California.

#### “KIND OF MATERIAL REQUIRED:

“All materials required for the trusses and all the material required for the flanges of riveted girders must be open hearth or Bessemer steel.

“All other material required for riveted members and the beams and channels used in the floors, with their connections, may be made of Bessemer



steel, unless in special cases it shall be otherwise specified.

“All machine driven rivets must be steel.

“The rods, bolts, anchors, lateral ties and all hand driven rivets must be of wrought iron.

“Bearing plates in masonry, pedestals under columns, separator, brackets under plates and filler blocks more than  $1\frac{1}{2}$  inches thick must be made of cast iron.

“CHARACTER AND FINISH OF MATERIALS:

“All steel used in this building must comply with the following specifications:

	Medium Steel.	Soft Steel.
“Minimum ultimate strength in lbs. per sq. in.....	68,000	60,000
“Minimum ultimate strength in lbs. per sq. in.....	60,000	.....
“Minimum elastic limits in lbs. per sq. in. ....	32,000	30,000
“Minimum percentage of elonga- tion in 8 in.....	22%	26%

“Test pieces of medium steel must bend cold 180 degrees about a diameter equal to the thickness of the piece without any sign of fracture on the convex side of the bend. They must also stand the same bend after being heated to a light cherry red and quenched in water whose temperature is 82 degrees Fahrenheit.

“Soft steel must be used for rivets and medium steel for all other material. All steel must be free from all faults or defects of any kind, or of any indication of unsoundness. Each piece must be straight, free from wind and of proper section. A variation of weight in either way of more than two

per cent from that specified shall be cause for rejection.

“All wrought iron used in this building must have an ultimate strength of not more than 48,000 pounds per square inch, and elastic limit of not less than 26,000 pounds per square inch and an elongation of 20 per cent in eight inches. The wrought iron required for bolts and rivets must be so ductile that test pieces will bend cold 180 degrees flat without any sign of fracture on the convex side of the bend. All the wrought iron must be perfectly welded in rolling, fibrous, uniform and free from all defects. Each piece must be straight and of proper section.

“All the cast iron used in this building must be tough gray iron, free from cold shuts, blow holes or other serious defects. Its quality must be such that sample bars one inch square cast in sand moulds must be capable of sustaining on a clear span of four and a half feet a central load of 500 pounds when tested in the rough bar.

#### “PAINTING:

“All iron for the trusses must receive a coat of pure raw linseed oil at the rolling mills before being loaded on the cars.

“The covered surfaces (surfaces in contact and surfaces enclosed) of all parts of riveted members must receive one good coat of graphite paint after the pieces are punched and before they are assembled. All finished members must receive one complete coat of the graphite paint before they are taken from the shop or exposed to the weather. All surfaces that can be reached must have one coat of the graphite paint after erection. All truss members must have two coats of paint in the shop, and the enclosed surfaces of these members must have the two coats before they are assembled. All



bolts used in erection and remaining permanently in the building must be dipped in graphite paint before being placed in position.

“All pins and bored holes or other planed surfaces in the trusses or columns must be coated with white lead and tallow before leaving the shop.

“All painting must be done on dry surfaces and preferably warm ones. All dirt and foreign matter of any kind must be removed from the iron before painting. All scale must be removed from finished members before painting the first coat in the shop. All scale must be removed from material required for the trusses before it is oiled at the rolling mill.

“The paint used must be a superior graphite paint approved by the engineer.

“INSPECTION:

“The shop inspection hereby provided will be made by inspectors employed by the engineer.

“The contractor for the structural iron must furnish full and ample means for the inspection of all the material called for by these specifications, and of all the work required in fitting such materials for erection, and to this end he shall admit the architect's engineer and inspectors to any part of the mills or shops where work under these specifications is being carried on.

“To secure proper material as herein specified, one pulling test must be made from every heat or blow of steel, or rolling of iron, and one bending and one quenching test when such requirements are specified; if these are satisfactory, the whole will be accepted. If they are not satisfactory, others may be made as the inspectors may deem expedient. All test pieces must be prepared at the expense of the contractor for the structural iron. The test pieces of rolled steel and wrought iron

must be cut out of finished material and must not be less than one-half square inch in section. They must be at least ten inches long between fillets when turned down; when possible, they must be cut from the full thickness of the section from which the tests are taken.

“The number of test pieces of cast iron must be fixed by the inspector.

“The material used for full sized tests will be paid for at cost, less the scrap value of the material to the contractors, when the pieces are tested to destruction, and the test proved satisfactory; otherwise, it must be solely at the cost of the contractor. The use of testing machines capable of testing both specimens of material and the full sized members, together with all necessary assistance in handling and operating the same, must be furnished by the contractor free of all expense.

“All surfaces of all materials must be carefully examined by the inspectors, and all pieces that are a full section, free from flaws, straight and in every way satisfactory, must be accepted. This inspection will not, however, prevent the rejection of any piece at any later time, but before it is riveted in place in the building, if it is discovered that the piece is in any way unsuitable; ample assistance must be given by this contractor to the inspector in making this examination.

“All material manufactured under these specifications must be tested and examined as herein provided before the same is oiled or loaded on the cars for shipment from the mill or shop, and as soon after rolling as may be convenient for the mill or shop, and failure to comply with these specifications will be sufficient cause for the rejection of the material.

“The inspection in the shop must in general cover the identification of the material, the accu-



racy of work and fulfillment of specifications and drawings in every respect, and reports of finished weights and progress of the work, in all of which the inspector must have ample opportunity to do his work. All rejected material must be made good to the satisfaction of the inspector.

“All long measurements in the shop made by the inspector must be made with a steel tape, which must be compared with the shop’s standard measure to assure their agreement. In case of any disagreement between the inspectors and the contractors regarding the inspection appeal may be had to Joseph D. Smedberg, Consulting Engineer. His decision shall be final.

#### “BEAMS:

“In general, not more than three-eighths of an inch will be allowed by the drawings for clearance at each end of beams connecting two beams, and not more than one-quarter of an inch at each end of beams connecting to columns. All beams supported by connection angles, riveted to the webs, when finished, must measure out to out of such connection, angles not more than the length given on the drawings and not more than one-eighth of an inch less than that length. All beams connecting to columns without connection angles may be one-half inch shorter than shown on the drawings, must not be longer.

“All open holes must be true to the drawings and error in the distance from end to end between the open holes and the flanges at the ends of beams of more than one-sixteenth of an inch must not be approved by the inspector.

“Where connections are marked ‘Standard,’ the standard adopted for this particular job must be used. Beams or other materials used in floor construction, excepting bent plates used in connec-

tion, must not be heated for bending, cutting or fitting, unless so marked on the drawings.

“Beams split or permanently injured by work in the shop must not be used. Beams which are required to be bolted with separators in the building must be assembled and bolted together in the shop when practicable.

“COLUMNS:

“The distance from the center of the columns out to the open holes required for the connection of beams must be verified by the inspector. If, on account of the material overrunning in weight or on any other account, these distances are wrong more than one-sixteenth of an inch, the error must be remedied as the inspector may desire.

“All columns must be milled or ground at each end to a smooth bearing surface at right angles to the axes of the columns, and inspector must verify from time to time the adjustment of the machinery used in this work.

“All columns must be exactly true to length and any discrepancies in such lengths of more than one-thirty-second of an inch must be reported promptly to the engineer. If more than one-thirty-second of an inch too long, they must be milled shorter.

“Where columns coming over each other are designed to have the same exterior dimensions, a filler about one-thirty-second of an inch thick must be put under the spliced plates where they are riveted to the columns. These fillers must cover the entire area covered by the spliced plates. They will not be drawn on the drawings, but will be noted in the bill of material on each drawing where required. Columns must all be straight.



## “RIVETED GIRDERS:

“Web plates must be arranged so as not to project above or below the flange angles. The lines showing the edges of such plates will be omitted from the drawings. In general, all stiffener angles must fit tight at both ends.

“Open holes and flanges must have the same accuracy required for beams.

“All riveted girders must be out of wind before leaving the shop.

“Compression members must have all butting ends planed smooth and exactly square to the center line of the member, and they must be assembled in the shop for the fitting of the splice plates and to insure perfect contact throughout. Such members must be entirely free from twists or bends and all work must be neatly finished, and first class in every respect.

## “CASTINGS:

“The cast pedestals required for the columns must be planed, smooth on top and to exact dimensions. All holes for the bolts connecting to the columns must be drilled also to the exact measurements given, and the holes and other castings must be drilled when so marked. All surfaces marked ‘planed’ must be planed smooth and true for a perfect bearing as designed.

## “RIVETS:

“Drifting that is liable to injure the material must not be allowed anywhere in erection.

“Shop rivets must be machine driven as far as possible.

“Rivet heads must be concentric with the necks of the rivets, and all rivets when driven must completely fill the holes and be tight.

“Rivets will be used in erection wherever possible.

“All rivets must be uniformly heated.

“Holes that do not match sufficiently to admit the rivet without drifting in assembling work in the shop must be reamed.

“All riveting must be done to the satisfaction of the engineer.”

These specifications state minutely the length, width and height of the building, and the lot upon which it was to be erected. They assert that they are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer, as herein specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. “The contractor will understand that the construction herein described is also to be complete in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand the construction and to fully inform himself in regard to any portions that he may not clearly understand,” etc.

Now, these specifications also very minutely describe the kind of material required, how each member is to be attached to other members, the material of which the rivets are to be composed, and how they are to be driven, the carrying strength of the steel per square inch, etc., and how it is to be painted, etc.

Indeed, it would be difficult to find a set of specifica-



tions which more minutely describe the structural steel for which plaintiff in error agreed to pay \$77 per ton.

These specifications are identified by their caption. Moreover, the correspondence between the parties leading up to the execution of the contract wherein it is stated that two copies of the specifications had been forwarded by plaintiff in error to the defendant in error (Rec., p. 86), one of which copies was thereafter returned to plaintiff in error by defendant in error with its proposed contract of January 4, 1907, and referred to therein as being identified with marks: "Copy No. 1," initialed "S. B. H. 12-30-06." The copy retained by defendant in error did not bear these identification marks, but had the plaintiff in error at the trial furnished to the Court its copy of these specifications so marked when it produced the original contract, such copy would have exhibited the marks in question. Not only so, but the copy of the specifications in evidence was undeniably the carbon copy of the one mailed to plaintiff in error with the proposal of Jan. 4 (Rec., pp. 86, 104, 105).

The drawings used in evidence were beyond doubt the drawings referred to in the contract, as furnished, and to be furnished by J. D. Smedberg. Not the slightest intimation can be found in the record by counsel for plaintiff in error that the drawings constantly referred to and used in evidence were not the drawings in contemplation of the contract.

Now, in addition to the written proposition for furnishing the structural steel, and its written acceptance by plaintiff in error, and the specifications quoted, there were many blue prints prepared by the Consulting Engineer showing the general plan of the building and indicating the structural steel required. These

were all furnished by plaintiff in error to defendant in error (pp. 79-84 and 85) and were present and used at the trial in examining the witnesses, both by plaintiff in error and defendant in error. They were not formally offered in evidence because it was agreed they would incumber the record; but they were shown to the jury and examined by the Court and used by counsel for plaintiff in error in examining its witnesses, as appears by the record (Rec., p. 235, Breite's evidence; Rec., pp. 244-5, Snyder's evidence; Rec., pp. 247-250, Galloway's evidence).

Not only so, but the uncontradicted testimony showed that a number of oilcloth drawings, onion skin drawings, **and material orders**, prepared by the defendant in error for the structural steel and approved by the Consulting Engineer were also received in evidence (Rec., pp. 125, 126; see also p. 306).

Even Breite, the hired expert of defendant in error, testified that the orders for material prepared by the defendant in error and o. k.'d by the Chief Engineer covered 262 tons. But he forgot to tell the Court and the jury that there were many typical stories in the building to which the detail drawings would apply as readily as they applied to the particular story for which they were drawn (Rec., p. 234). Breite testified that for detail drawings for an office or hotel building it would be worth \$1.50 per ton for such drawings (Rec., p. 237).

In cross-examination he testified:

“I have never been an architect, but I am an engineer. I was never an accountant in any manufacturing establishment that fabricated steel. I never employed men who worked with their hands



in fabricating steel, nor do I know the wages that the Modern Steel Structural Company at Wauke-sha, Wisconsin, paid its men for fabricating steel. **The cost of fabricating depends on the wages paid and the work a man would turn out in a day. No man can give an intelligent answer without knowing these factors**” (Rec., p. 239).

**The Witness (continuing): “I do not know what wages were paid in 1907 by the plaintiff, nor do I know what work was expected of a man to turn out in a day; in order to determine its cost, I should know these factors”** (Rec., p. 239).

**Peter Zucco**, called as a witness for the plaintiff in error, testified: **that he had examined the papers annexed to the deposition of S. B. Harding.** He was then asked by Mr. Humphrey about what tonnage was covered by them, and he said “about 256 or 257 tons.”

**“Q. Is there any drawing or design there from which it is possible to determine the exact tonnage that would go into that building?”**

**“A. Absolutely not, sir”** (Rec., p. 241).

This witness did not examine the plans for the building.

Now, no one supposed, for an instant, that the exact tonnage could be determined until the steel had been fabricated and actually weighed. It was the intent and purpose of the contract that the actual weight, after being fabricated and put on the scales, would settle the exact tonnage. Plaintiff in error having breached the contract before that stage arrived, the defendant in error introduced the best evidence of which the case was susceptible of the quantity of steel the contract by inevitable implication covered. The contract between plaintiff in error and defendant in error implied

that there would be required the usual or average amount of structural steel in the erection of this building that is ordinarily required for a steel structural building of its dimensions, height and style.

The paragraph of the specifications entitled "REQUIREMENTS OUTLINED," page 109 of the record, reads:

"This contractor must furnish and set all the iron and steel shown or referred to in these specifications, and called for by the said drawings hereinbefore referred to, and when the erection is completed, he must remove all the materials used in performing the work. He must furnish in all cases the exact sections, weights and kinds of material that is called for, or those of approved equivalent strength, and he must follow exact details, methods and instructions called for by these specifications and said drawings. **He must set the iron work as fast as may be considered practical in the judgment of the engineer, always keeping at least one story in advance of the masonry.**"

The paragraph quoted undeniably shows that the building was to be a steel frame one, and in construction the steel frame should be carried up at all times one story in advance of the curtain walls. In all such cases the steel structure carries the beams and girders. The specifications show this beyond question.

The specifications at page 108 read:

"These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer, as hereinafter specified;



and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. **The contractor will understand that the steel construction herein described is also to be complete in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand the construction and to fully inform himself in regard to any points that he may not clearly understand."**

It is a fundamental rule of law that what is implied in a contract is as much a part thereof as if written in the contract. It was implied in the contract and specifications that there would be used at least the ordinary amount of structural steel for the erection of a structural steel frame building of the size and of the type described in the specifications. No one familiar with the plans has placed the quantity at less than 1200 tons. The vice-principal of plaintiff in error stated it would require 1400 tons. Guided by the ordinary cubic contents, according to the undisputed testimony, a building of this size and type would ordinarily take 1500 tons. It was so testified by at least three witnesses in behalf of the defendant in error. Often in the closing of contracts for structural steel for a lump sum, the cubic contents of the building is the most important factor in determining the quantity required. It is a very safe rule in so far as office buildings are concerned. The supposition of one of the witnesses for the plaintiff in error was that the theatre work might have been greatly elaborated, involving an undue weight of steel for that part, and that this precluded the idea of determining accurately the quantity of steel required. However, no effort was made on the part of

the defendant in error to enhance the weight, on the theory that there would be an undue quantity of structural steel used. On the contrary, its testimony only tended to show what would be the average weight of a structural steel building, with a theatre in one part, of the dimensions in question. Now, the average weight of structural steel required for such a building, the evidence shows, was 1500 tons. As stated before, nobody ever suggested or intimated that it would require less than 1200 tons. The evidence adduced by the plaintiff in error that no one could determine accurately the quantity of structural steel that the architect might have required by adding unnecessary weight to certain parts of the members, is aside the question. We will assume that if the architect had run up the weight to 1700 or 1800 tons, still the defendant in error would have furnished same as it was to be paid a unit price per ton. However, nothing of that kind occurred, because all the steel for columns, girders and beams from the basement to the eighth floor for stores and office part had been fully settled by the engineer before the contract was breached.

The parties to the contract at all times after it was executed understood it thoroughly and gave it a practical interpretation. They did business under it, and plaintiff in error received from defendant in error two car loads of structural steel, of the value of \$3,021.09 under this contract and pursuant to its terms, but failed to pay for the same. Not a word was uttered by plaintiff in error to the effect that it did not understand this contract, or that it was invalid, until many months after it was breached by plaintiff in error. On its breaching the contract, the correspondence shows that it recognized its liability for the breach and took up



the question of damages for which it was liable, and much correspondence passed between the parties with reference thereto. Pages 132 to 151 of the Record contain the written demand of plaintiff in error to the defendant in error that breached the contract. The Record manifests inexcusable unfairness, if not dishonesty, of the plaintiff in error in failing to pay for the 39 $\frac{1}{4}$  tons of structural steel obtained under the contract and appropriated to its own use. It discloses a deliberate purpose, on the part of the plaintiff in error, to obtain valuable property from the defendant in error, and after breaching the contract, then to escape paying for the same, if by some technicality it might do so.

The uncontradicted evidence adduced at the trial justified the Court in charging the jury:

“While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that these specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execution, so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed.”

“As to the alleged breach of the contract by defendant, the action of the defendant, as disclosed

by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant.”

It is respectfully insisted by counsel for defendant in error that this charge of the Court was right and legal.

### **WHAT IS A CONTRACT?**

A contract may be defined as an agreement between competent parties supported by a legal consideration and in the form, if any, prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing.

9 Cyc., 240.

7th Amer. & Eng. Ency. of Law (2nd Ed.), 90, defines a contract thus:

“A contract has been defined to mean an agreement upon a sufficient consideration to do or not to do a particular thing. It includes necessary implications. It comprehends not only what the exact words of the instrument literally signify, but also what the law necessarily implies from the language.”

State v. Laclede Gas Light Co., 102 Mo. 472, holds:

“Whatever the law necessarily implies in a statute or a contract is as much a part and parcel thereof as if expressly stated therein.”

Now, can there be a shadow of doubt in the mind of this court that every element essential to constitute a



contract, as defined above, obtained between plaintiff in error and defendant in error as to the structural steel in question?

### **CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR DISTINGUISHED.**

At pages 74-76 counsel cites the following cases:

*Nave v. McGrane*, 113 Pac. 82, was an action by an architect to recover the alleged contract price for preparing building plans and specifications. It was held that the plans and specifications were so defectively drawn that the architect was not entitled to recover.

*Price v. Stipek*, 104 Pac. 195, was an action against an alleged purchase of jewelry where the vendee refused to carry out the alleged contract. It was held, where an offer to purchase jewelry requesting the shipment of goods listed on a printed memorandum containing a large quantity of goods of various kinds, qualities and prices and did not state how many articles of the particular kind were desired or the quantity or the price to be paid, the contract was so indefinite and uncertain as to those matters that it was void under Revised Code, Sec. 4999, making the entire contract void.

*Jules Levy & Bro. v. Mautz & Co.*, 16 Cal. App. Rep. 666, an action on a contract for the purchase of goods for a period of years, held: A contract for sale must be certain as to the things sold and designate the price to be paid for, and if an executory contract of sale is uncertain and incapable of being made certain in the essential parts of the price to be paid for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach.

Grafton v. Cumming, 99 U. S. 106. The syllabus reads:

“In order to satisfy the requirements of the Statute of Frauds of New Hampshire the memorandum in writing of an agreement for the sale of lands, which is signed by the parties to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by the party, the other contracting party must be so designated that each can be identified without parol proof.”

Gill Mfg. Co. v. Hurd, 18 Fed. 673, held:

“In order to constitute a contract, the minds of the parties must meet and all the terms of the same be agreed to. If any part of the contract is not settled by the parties, or a mode agreed upon to settle as to that part, there can be no contract.”

Almini Co. v. King, 92 Ill. App. Rep. 276, held:

“A contract which refers to plans and specifications, as herein made a part of the contract, but which are not attached to it and which contain nothing to locate or identify them in any way, is incomplete and not admissible in evidence.”

Each of the cases above referred to is clearly distinguishable from the case at bar. Indeed, we are unable to see any analogy between any of the above cases and the case at bar.

In Worden v. Hammond, 37 Cal. 61, it was held that under the contract specifications were an essential part thereof, as describing the material, the price and terms of payment, but as no specifications were attached to



the contract, nor in any way identified with the contract, the contract was void.

In *Willamette, Etc., Co. v. College Co.*, 94 Cal. 229, it was held that where the contract made the drawings and specifications an essential part thereof, as to material and the price of the work or terms of payment, and until they were thus annexed to the contract so that its entire terms could be ascertained by mere inspection and without oral testimony, the contract was incomplete.

*Donnelly v. Adams*, 115 Cal. 129, enunciated the same principle.

In each of these California cases there was a false recital of the contract. In the first case the quantity of work, the quality of material and all that were left for description in the specifications, and the contract said they were attached thereto, but as a fact no specifications were ever attached to the contract. Under those circumstances the Court properly held the contract incomplete and void.

In the second case the specifications which were supposed to describe the material, the price, the workmanship and time of payment were not attached to the contract, although the contract stated they were so attached, nor were any marks or description mentioned in the contract by which the specifications could be identified, and it was held that the contract was incomplete.

The same principle is announced in the third California case, but how different these are from the case at bar. In the case at bar the unit price per ton was agreed upon. The time for payment after the date of the invoices was fixed. The quantity was to cover all the structural steel for the building erected on a cer-

tain lot and of certain dimensions, all fully described in the specifications; the kind, quantity, quality and the carrying strength of the steel was all minutely described; and from the dimensions of the building and its nature and character and the kind of construction it was implied that the building would take, in all probability, 1500 tons of structural steel. No one ever suggested it could possibly take less than 1200 tons; and the plaintiff in error, in examining his witnesses, at all times assumed that it would take 1200 tons. The contract fixed a positive and definite method of arriving at the exact tonnage that would be used in the building, namely, by weighing the metal on scales after it was fabricated. However, plaintiff in error breached the contract after it had received over \$3000 worth of the structural steel in pursuance of the terms of the contract, and after the detail drawings had substantially been completed for the store and office part of the building from the basement to the eighth story, thus making it impossible to arrive accurately at the exact tonnage the building would have required had plaintiff in error not breached the contract. Now, no such case is cited by counsel for plaintiff in error. Indeed, no case of this type can be found where the seller was denied relief and where his damages were placed at a lesser sum than the actual profits he lost by being prevented from carrying out the contract. But the plaintiff in error asked the Court to go further. It asked the Court to assist the plaintiff in error in swindling the defendant in error out of the structural steel plaintiff in error received and appropriated to its own use, which, with interest to date, would equal about \$4500.



We assume no court can be found willing to assent to any such monstrous proposition.

## PROPOSITION II.

### Does the Evidence Sustain the Verdict as to the Damages Assessed by the Jury?

**Samuel B. Harding**, the president of the defendant in error, testified concerning the damages of the plaintiff substantially thus:

The total weight of structural steel shipped was 78,470 pounds, or approximately  $39\frac{1}{4}$  tons, and at \$77.00 per ton, its value would be \$3,021.09. The approximate cost for the steel from the rolling mill was \$38.00 a ton, or \$1,570.00. Drawings at 90 cents per ton, \$35.33; shop labor at \$4.80 per ton, \$188.40; freight at \$15.00 per ton, \$588.75. Approximate total cost of the  $39\frac{1}{4}$  tons, \$2,382.48 (Rec., pp. 127-128).

He testified that they had the total quantity of steel contracted for to complete the Columbia Theatre job, on the basis of 1,500 tons, and the cost under their contract for such steel delivered at Waukesha f. o. b. cars was \$38.00 a ton (Rec., pp. 128-130).

He testified that the job would require 1,500 tons and possibly more to complete it. He testified that Mr. Vigus, the general manager for the plaintiff in error, thought 1,400 tons would be the quantity required, while the architect and engineer stated 1,400 to 1,500 tons would be required.

Mr. Harding also testified that the labor of fabricating the steel would have cost \$4.80 per ton. That this was the reasonable cost of shop labor, including all work of the journeymen who work with their hands in the actual production of the work. The journeymen drill out the hole, punch, assembly, rivet, paint and

load the steel and other things. In the \$4.80 a ton is included the work of the journeymen. The total labor for drawings for 1,500 tons at 90 cents a ton would be \$1,350. Considerable of the drawings had been done when plaintiff in error breached the contract, and it would still cost to complete those drawings only \$680.72. That sum would have covered all the expenses in the completing of the detail drawings. This does not include the labor of the head draughtsman, but relates to the journeymen labor alone. The freight to San Francisco remained constantly at \$15.00 a ton. "I know the freight rate from Waukesha to San Francisco during that time remained at that figure because we had other business going to the Pacific Coast, both before and after this date, at the same rate per ton. The freight for the shipment of 1,460 $\frac{3}{4}$  tons that were not delivered would amount to \$21,911.25" (Rec., pp. 152-3).

The unfabricated material from the rolling mills delivered at Waukesha at \$38.00 a ton for the 1,460 $\frac{3}{4}$  tons not delivered to plaintiff would have cost \$55,508.50 (Rec., p. 153).

The paint required to paint the 1,460 $\frac{3}{4}$  tons with graphite paint would have cost \$3.75. Graphite paint is the kind required by the specifications. It would have cost for coal for power \$162.00; for fuel oil, \$72.00; for paint brushes, \$50.00; for punches, \$35.00; or in all \$694.00 for these items (Rec., p. 154).

The total journeymen shop labor for the entire job for 1,500 tons would have cost \$7,200. There had been incurred the shop labor for the journeymen, \$328.64, and to have fabricated, painted, etc., the remaining part of the 1,500 tons would have cost the Modern Steel Structural Company \$6,871.36 (Rec., p. 155).



Fifteen hundred tons at \$77.50 per ton would amount to \$115,500.00, and deducting the items of cost, which defendant in error would have been required to incur to have completed the fabrication and delivered the remaining part of the 1,500 tons f. o. b. San Francisco would have left a profit of \$34,470.00 (Rec., pp. 155-156).

**Henry A. Sell**, a witness whose deposition was taken at Waukesha and read in evidence by defendant in error, testified that he was 38 years old, resided at Waukesha, and was superintendent of the structural department of the Modern Steel Structural Company; that he had been in the employ of the structural company for eleven years and for three years he was shop foreman and was superintendent eight years. That during the last eight years he has been superintendent of the workshop and his duties are to supervise the work, estimate the work, estimate the work and supervise and figure on the cost. That he was familiar with the Columbia theater job, and, roughly speaking, with the plans and specifications and details of that job.

From his knowledge of the workings of the shop and the cost of labor, the cost in the spring and summer of 1907 of shop labor of journeyman labor, during the work of fabricating steel, for a job like the Columbia Theater, would be about \$4.75 a ton, which included the loading and painting of the steel. That is my judgment from my experience in that line (Rec., p. 174).

**Frederick Hoffman**, a witness whose deposition was taken by defendant in error at Waukesha and read in evidence at the trial, testified that he was a structural engineer by occupation; that he resided at Waukesha, Wis.; that he had been a structural engineer for five or

six years; that he was educated at a technical school in Germany; that he was in the employ of the Modern Steel Structural Company of Waukesha and had been for nine or ten years. That he was first employed as shop inspector and for the last five or six years before his deposition was taken he had been engaged as structural engineer; that his duties consisted of making general plans of structural steel structures; making detail plans; writing up specifications, and perhaps, occasionally checking detail plans for the company. To a certain extent he was familiar with the plans and specifications for the Columbia Theater job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time he knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions, and it was his judgment that it would require for the structural steel of said building 1,500 tons.

The witness, continuing, says: "That would be a fair estimate. I arrived at approximately 1,500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

"Rivets are used in riveting metal together and the angle-irons become a part of the material that is weighted before the metal is sent." That angle irons coming from the mill cost the same as the other steel and rivets at about the same. "Generally, riveting steel is somewhat less—less than the other" (Rec., pp. 176-7-8).



**Cross-Examination**, by Mr. Humphrey.

“I said it would take 1,500 tons of steel because I just estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for” (Rec., p. 178).

**F. W. Harding** was present at the trial and testified in the case. He testified that he was 41 years of age, resided at Waukesha, Wis., and was vice-president of the Modern Steel Structural Company of Waukesha. Prior to becoming vice-president he was treasurer of the company and directing manager of the board of directors; that he was familiar with the contract that existed between the Modern Steel Structural Company and the American-Pacific Construction Company. That he examined it critically and carefully and the specifications and plans for the building in question known as the Columbia Theater, and **“I can state very approximately that at least 1,500 tons of steel would have been required to construct that building.”** That he had done a great deal in behalf of his company in taking contracts and was required to place valuations on work.

The witness further testified that the cost per ton of steel did not exceed \$38.00 a ton. Some was lower. “Plaintiff fabricated and shipped under its contract prior to April, 1907, 39¼ tons of steel, but did not get out the rest, because we were instructed by the American-Pacific Construction Company to stop all work on this contract. According to my best judgment, it would cost \$4.80 a ton for shop labor to have fabricated remaining 1,460¾ tons. My knowledge of the cost of fabrication is gained by experience because we keep honest record of all our contracts that pass through the shop. It is my business to know the value of work,

because I am continually doing business, and placing valuations on work. I have been in the business altogether for eleven or twelve years. The total cost of fabricating so far as shop labor was concerned, 1,460 $\frac{3}{4}$  tons that remained to be furnished when the work was stopped would have been \$6,871. There was some drafting remaining to be done. This drafting was worth 90 cents a ton; getting up the detailed drawings, for the labor alone, and to complete all of the drafting for this job would have cost \$680. We were using graphite paint. The paint for the remaining number of tons would not have exceeded \$375, and the power and coal would not have exceeded \$160, and the cost of fuel oil to complete the job would not have exceeded \$75, and the wear and tear on the machinery for getting out the balance of the work would not have been more than \$150 to \$160. I arrived at that figure by taking our plant and machinery depreciating and dividing it for that particular part of the work. It would have required also about 1,200 additional feet of lumber to get out the balance of the templates. The value of that would have been \$28.00 a thousand or \$32.00. The paper to have completed the drafting would amount to about \$2.00; and the ink for tracing the drawings would amount to \$2.50 or \$3.00, and there would have been blueprint paper; that would be worth about \$6.00 or \$7.00. The freight on 1,460 $\frac{3}{4}$  tons to San Francisco was \$15.00 per ton; and that was the rate at all times during the first half of 1907 (Rec., pp. 183-4-5).

We saved on the purchase of steel \$55,508.00. In the matter of small items like paint and coal, fuel oil, paint brushes, punches and additional sheets of tracing cloth, ink and blueprints and template lumber, de-



preciation of machines, a total of \$890.92, and to have completed the shop labor would have cost \$6,871.00 or the entire cost to us including freight would have been \$85,862.75. **Our sale price of the job was \$115,500.00, showing a difference of \$29,637.00**” (Rec., p. 186).

Witness (continuing): “We have overhead expenses, salaries that we pay to the heads of departments who are employed by the month, and our different officers, who are also employed and paid by the month, **and whether this job was in the shop or not, it would not have made any difference with regard to those expenses, as we keep our organization together anyway. I am positive I have given everything, every item of cost, that would go into the fabrication of this steel**” (Rec., p. 187).

**F. W. Harding** went into a most careful calculation of the items of expense that defendant in error would have incurred in completing the contract for 1,500 tons of steel, and his testimony showed that the defendant in error was entitled to recover for the steel already delivered, and the loss it incurred in consequence of the breach of the contract by plaintiff in error, the sum of \$29,637.00.

He stated 1,500 tons of steel would be required for the building. “I had to take the cubic foot rule because the general drawings were not completed for the entire building, but we knew the size of the building. The building was a combination of both office and theater building—a combination of both. There were some store buildings in the bottom or in the first story and then came the theater portion of which there was quite a lot of open space where the theater portion was, and above that, and I think partly on the sides, was

more or less office construction. That is in a general way, as I remember it. This building was to be constructed on the southeast corner of Geary and Van Ness, but was never built (Rec., p. 201).

The witness further testified: “**The cost of fabricating steel for a theater is more than the plain beam work of an office building. The theater portion of that whole building, where you might term that part of the work as being more difficult than the other, would not be more than five per cent of the total weight of the building. It would only be a small factor in the cost of the building**” (Rec., p. 202).

As against this testimony, plaintiff in error called four paid experts to prove, if possible, the damages incurred by the defendant in error were less than the overwhelming testimony tended to establish.

**Mr. Breite**, called by the plaintiff in error, testified:

“The actual drafting room, or drawing cost omitting overhead charges per ton for detail drawings for an office or hotel building, would be not less than **a dollar and a half a ton.**” The shop cost for details on theater work would run 50 cents higher than the ordinary office building would (Rec., pp. 236-7).

That he has examined closely the drawings and **material sheets** and papers attached to the deposition of S. B. Harding. “They comprised thirty-one tracings, 24 by 36 and 28 beam sheets, and 68 shop bills, and only cover the office portion of the proposed building. \* \* \* **Only 262 tons are shown on the details of the shop bills.**” “There is no paper in the record or annexed to the deposition of **Mr. S. H. Harding** that would enable a man or an engineer to determine how many tons of steel would be required for the completing of the building referred to in said deposition. Before the number



of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building. Without that complete design it is not possible to tell the number of tons (Rec., p. 234).

**Cross-Examination**, by Mr. Taylor.

The cross-examination of this witness shows that he had very meager experience and knowledge concerning the matter about which he testified (Rec., pp. 238-239).

He testified: "I never employed men who worked with their hands in fabricating steel, **nor do I know the wages that the Modern Steel Structural Company at Waukesha paid its men for fabricating steel. The cost of fabricating steel depends on the wages paid and the work a man would turn out in a day. No man can give an intelligent answer without knowing those factors.**"

"I do not know what wages were paid in 1907 by the plaintiff, **nor do I know what work was expected of a man to turn out in a day; in order to determine its cost I should know these factors**" (Rec., p. 239).

**Peter Zucco**, called and testified for the plaintiff in error, said: "I am a consulting engineer. I have followed that profession for 21 years." **His attention was called to the papers annexed to the deposition of S. B. Harding and he testified that he had looked at those papers and estimated the tonnage covered by those papers. He stated that the tonnage covered by those papers was about 256 or 257 tons.**

By Mr. Humphrey (Q.): Is there any drawing or design there from which it is possible to determine **the exact tonnage that would go into that building?**

A. Absolutely not, sir (Rec., p. 241).

It is to be remembered this witness testified only as to the exhibits attached to the deposition of Mr. Harding.

No person in behalf of the defendant in error suggested that the exhibits attached to the deposition of S. B. Harding furnishes data from which the exact tonnage of the building could be determined (Rec., pp. 240-41).

**C. H. Snyder**, the third witness called by the plaintiff in error, testified: "The shop cost of fabricating steel for a theater in 1907 would, in my opinion, be about ten to twelve dollars a ton. It might be more than that." That it would be 50 per cent greater for fabricating steel for a theater than for an office building (Rec., pp. 242-3).

**Cross-Examination**, by Mr. Taylor.

The witness testified that he could not tell how large the building was to be; that he could not tell how many stories high the Columbia Theater Building was to be.

Q. Don't you know that it was to be 149 feet 6 inches one way by 120 feet the other way?

A. Probably you are right. I don't know. I don't recollect now.

Q. And the theater part placed in the building of the dimensions that I am talking about, 149 feet 6 inches one way by 120 feet the other way, eight stories high, or 112 feet, would occupy only a part of the building?

A. Yes, probably it would.

Witness (continuing): When I was talking about the additional cost of steel for a theater building, I meant that steel which related to the theater proper (Rec., p. 244).



He then takes the plans or blue prints, and says: "Yes, this is the plan."

Q. What is there on this plan that shows the roof? Point it out to the jury.

A. It is shown right in there (indicating).

Q. Was that to be a glass roof?

A. I don't know what the character of the roof was to be, but that is the roof in there.

\* \* \* \* \*

Witness says: "This white space represents where the stage was. I am just judging by the looks of these plans. I have not seen the architectural plans."

Q. Do these marks on this plan indicate iron work?

A. Iron work, yes. \* \* \* These plans are for the iron work, and these lines would each represent a member of iron. The members of iron as shown on the sixth floor for plans might indicate anything, but would be a kind of structural steel that would be easy to fabricate. I don't know of my own knowledge how high the theater proper came, but the theater, I should say, was below the roof. The other plans indicate how high the theater was and how long. These plans that have been exhibited here indicate the size and position of the theater. These drawings here indicate that this is all (referring to the sixth floor plans) of the theater, because here is a frame that looks very much like a box frame. That is all that I can tell you" (Rec., pp. 245-6).

**John D. Galloway**, called and sworn for plaintiff in error, testified:

"I have examined the drawings on file in this matter. These drawings, or plans, on file are not at all what is known as architectural plans. **They are what is known as steel drawings, some of them being shop**

details, and some of them being plans that are usually designated as engineering plans made by the architect. There is nothing there among those plans that would allow one to make an estimate of the total amount of weight in the building. The method of obtaining the weight of steel in a building by obtaining the cube of the building is regarded as merely the general method, and is not accurate in any sense of the terms. \* \* \* The only way in which to determine accurately the weight of steel in a theater building would be to have the plans prepared and an estimate made, piece by piece, of each one. In the plans I have examined there is a central portion bounded on three sides by straight lines, and on one side by a curved line, which I am told was the portion intended for the theater'' (Rec., pp. 247-8).

**Cross-Examination, by Mr. Taylor.**

Witness: "I saw the plans there, showing the first story and the mezzanine story, and I should judge that the building was to have been nine stories high. \* \* \* I don't know anything in the building law requiring the roof to be more than twenty feet high, and I don't know the restrictions of the building law in reference to a theater. I don't know that this building was planned so that the first story would have been twenty feet high. There is nothing on the plans to show that the greater bulk of the upper stories of this building was intended for offices. \* \* \* The only plans I have seen are those on file here. These details that were drawn for steel. There is nothing on the detail drawings to show around the sides of the first story that there was to be stores. I think the height of the various stories could be found out from



the plans. In office buildings there are typical stories, and on typical stories the plans drawn for the girders and beams for one floor, if the others are typical, as a rule, could be adopted for the floors above" (Rec., pp. 249-250).

Q. Were you employed as an expert in this case?

A. That question is impossible to answer.

The Court: Were you employed to come and paid to come here and give your testimony?

A. Yes (Rec., p. 251).

The Court: You have defined that in your mind for the purpose of answering the question that you have just answered here; can you define it for the purpose of answering counsel's question on cross-examination?

A. I will answer this: that I think the portion there that would have been devoted, which I would have supposed to have been devoted to theatrical purposes, was at least 50 per cent of the total contents of that building as shown by those plans (Rec., p. 253).

The testimony of the four witnesses above named called by plaintiff in error is unimportant. Justice White, now Chief Justice of the Supreme Court of the United States, in *Hansen v. Boyd*, 161 U. S., *l. c.* 402, said:

**"This Court will not determine the weight of the proof and thus usurp the province of the jury."**

To the same effect is *Railroad Co. v. Cox*, 145 U. S., *l. c.* 606.

However, if this Court should assume the function of considering the weight and credibility of evidence, it would conclude that on every proposition of fact involved the evidence in favor of the defendant in error greatly preponderates.

The jury did not return a verdict for the full amount

which the testimony of the defendant in error would have justified. The verdict was for the moderate sum of \$17,372. The two carloads of steel that were shipped to defendant March 1st, 1907, and received by it at the contract price was worth \$3021 (Rec., p. 127).

The invoice for this was payable at thirty days, or April 1, 1907 (Rec., p. 92).

The verdict was rendered Sept. 18, 1912. The interest on this shipment for five years and five and one-half months, at 7 per cent, equaled \$1155. So at the date of the verdict that value of the two carloads of structural steel received by the plaintiff in error, with the interest, aggregated \$4176. This, subtracted from the amount of the verdict, left only \$13,169 as damages of the defendant in error occasioned by its not being allowed to complete the contract. The evidence beyond question sustains this verdict.

### PROPOSITION III.

#### **Erroneous Statement of Account.**

The statement of counsel for plaintiff in error in his brief, pages 107 to 116, does not fairly state what the testimony for the defendant in error tends to prove.

By Mr. Humphrey (Q.): I hand you this and ask you if that is not a copy of the detail cost sheet of your work for the 39 $\frac{1}{4}$  tons?

F. W. Harding, the witness being examined, answered: "No, sir; I should say not. It includes all the work done in this contract up to a certain date. It includes draughting, office labor, the shop labor and freight charges not solely relating to the 39 $\frac{1}{4}$  tons" (Rec., p. 205).



**Cross-Examination.**

Q. That is a record of the work done under the contract?

A. Yes, I can go further. There was \$669 drawing labor, and here is \$328 shop labor (Rec., p. 203).

This witness did not testify that the \$669 labor for drafting related solely to the 39 $\frac{1}{4}$  tons. He stated directly the reverse of that. He testified that it covered all the expense for drafting details for the 1500 tons of structural steel for the job in question except \$680 still not done (Rec., p. 185).

**Samuel B. Harding** testified: That the detail drawings for the entire job would have cost 90 cents a ton, or \$1350, and it would still have cost to complete those drawings \$680.72; that there had been paid on the drafting \$669.28.

Of course, drawings already prepared and used in getting out the steel fabricated and shipped would largely apply to the remaining portions of the office part of the building.

In every office building there are many typical floors, and the detail drawings applicable to one floor are often applicable to many. The testimony of the two Hardings was entirely credible. Even the star witness for plaintiff in error, William M. Breite, testified that the detail drawings for an office or hotel building would be worth \$1.50 a ton and for a theater they would run 50 cents a ton higher (Rec., p. 234).

The overwhelming testimony tended to show that the shop labor for this job would not have cost exceeding \$4.80 per ton. (See Abs., p. 184; see testimony of S. B. Harding, Rec., pp. 152-5-8-9-160 to 162. See testimony of Henry Sell, Rec., p. 173.) He testified that a job like the Columbia Theater would cost

for shop labor about \$4.75 per ton, which included painting and loading of the steel. The statement at page 114 of the brief for plaintiff in error that Mr. Harding put the cost of fabricating the steel for the office building at \$8.00 a ton is false. Neither of the Hardings did anything of the kind; and even Breite, for plaintiff in error, testified that the cost for fabricating depends upon the wages paid and the work a man would turn out in a day. He testified: "No man can give an intelligent answer without knowing these factors" (Rec., p. 239).

The above also applies to the guesses of Snyder and Zucco and Galloway, the hired expert of plaintiff in error (Rec., p. 251). See also argument in our original brief, pp. 70-78.

We are conscious that we have given too much importance to this phase of the argument of counsel for plaintiff in error. We know, as every lawyer is presumed to know, that appellate courts do not weigh the testimony of witnesses, thereby usurping the province of the jury, but confine their attention to alleged errors of law, which are properly saved by the record.

#### PROPOSITION IV.

##### **Arbitration.**

At pages 118 to 119 of brief of counsel for plaintiff in error it is contended that it was necessary for defendant in error to submit its claim to arbitration before instituting this action. Such contention is untenable.

1st. No such defense was pleaded by plaintiff in error (Rec., pp. 62 to 69). Such defense, if it existed, should have been pleaded.

2nd. The language quoted from the contract by

counsel for plaintiff in error (his brief, p. 118) reads:

“In case any difference of opinion shall arise between the parties to this contract in relation to the contract or work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons,” etc.

No difference of opinion ever arose between the parties to **this contract in relation to the contract or work to be, or that had been performed under it.** Without any possible excuse, plaintiff in error breached the contract; acknowledged the breach; obtained and converted to its own use two carloads of steel under the contract; acknowledged its liability for the steel, but afterwards has sought by legal jugglery to swindle defendant in error out of the value of the steel thus converted, and also the damages to which defendant in error is entitled.

3rd. It is a fundamental rule of law, settled by Federal decisions, that an agreement to refer a case to arbitration will not be regarded by the courts, and that they will take jurisdiction and determine the dispute between the parties notwithstanding such an agreement.

## PROPOSITION V.

### **Statute of Limitations.**

The record shows that counsel for plaintiff in error resorted to various dilatory pleas, designed to postpone the trial of this case and to keep it in court until, if this judgment shall be reversed, the statute of limitations will have run against the claim of the defendant in error, thus enabling plaintiff in error to convert to its own use the steel it obtained from the defendant in error without paying a dollar for the same. Appel-



late courts under such circumstances are not inclined to reverse a judgment, especially when, as here, the verdict is right on the merits. See authorities cited in our original brief at page 67.

## POINT VI.

### **Unjust Complaints Against the Trial Court.**

The intimation of counsel for plaintiff in error that he was misled by the District Court as to the manner of saving exceptions is gratuitous and unjust. The trial court, observing the lack of ordinary knowledge of counsel, made a suggestion, which distinguished counsel pushed aside as idle. No duty devolved upon the trial court to assist counsel for plaintiff in error in saving exceptions, and it seems very unjust that counsel should blame the trial court for his own mistakes (Rec., p. 130).

See Rule 10 of this Court.

Mr. Humphrey says the court was hasty in submitting the case to the jury after informing him that he was not taking proper exceptions. This assertion is not true in fact, as the record will show (see Rec., pp. 267-8). After Mr. Humphrey had saved all the exceptions he wanted to save, the court said: "You will have to take your chances on that. I don't know that that applies in this court." The court here came to a full pause, giving Mr. Humphrey every opportunity to save exceptions in the proper way as to instructions and as rule 10 of this Court requires. The Court then, after a reasonable pause, said: "You may retire, however, gentlemen. If that is the idea of counsel, all right."

Mr. Humphrey: "That is the exception we desire to take" (Rec., pp. 267-8).

It is impossible to see anything in the record on the part of the court that was not absolutely open, fair and kind toward the distinguished counsel for plaintiff in error.

Price v. Pankhurst, 53 Fed. 312, cited by counsel for plaintiff in error, at page 313, lays down the doctrine that inevitably obtains and which precludes this court, if it would, from paying any heed to the alleged exceptions to the charge given or the instructions refused. Caldwell, C. J., in writing the opinion of the court, said:

“The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that, if the entire charge is excepted to in gross, and any portion of it is sound, the exception cannot be sustained (citing many authorities). Upon the organization of this court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule, and adopted as a rule of practice of this court, in the following terms:

“ ‘The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.’ Rule 10, 47 Fed. Rep. VI, I. C. C. A. XIV.

“This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. He cannot waive the rule,

so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the Judge's personal protection or benefit, but for **the protection of suitors and the advancement of justice.** It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice." See rules 8 and 10 of this court.

However, this matter has been fully discussed in our original brief filed with the clerk before the oral argument of this case, pages 32, 38 to 45, inclusive.

The assertion of counsel for plaintiff in error (page 135 of his brief) that the Court's announcement was tantamount to an instruction that the parties had duly executed a contract calling for a quantity of steel estimated at 1,500 tons, is palpably erroneous. The Court stated no such thing in its charge to the jury, but quite the contrary. This is what the Court charged:

"The evidence on behalf of plaintiff should be



such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and, secondly, **the probable gross quantity of steel, in tons, it would have required to complete the building.** Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is \$77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.”

### **FINALLY.**

Much of the brief of plaintiff in error is devoted to the weight of evidence. Such argument is irrelevant. Federal courts, where there is evidence tending to support a proposition of fact and evidence denying such proposition, will not weigh the testimony. The demurrer to the evidence offered at the close of the testimony in chief for the defendant in error was overruled (Rec., p. 233). It would have been palpable error to have sustained it, for in any event defendant in error was entitled to judgment to the extent of structural steel plaintiff in error had received under the contract.

But the record strikes deeper. If there had been merit in said demurrer, defendant, by offering evidence after it was overruled, waived it (see authorities in our Original Brief, p. 64).

Not only so, but plaintiff in error joined issue with defendant in error as to the damages it sustained, and adduced evidence on that subject. This estopped plaintiff in error from claiming that such evidence should not have been admitted.

Finally, we submit that the verdict was for the right party; that there was evidence sustaining it, and it is the duty of the Court to affirm the judgment.

SENECA N. TAYLOR,

WRIGHT and WRIGHT & STETSON,

*Attorneys for Defendant in Error.*





No. 2272

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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AMERICAN PACIFIC CONSTRUCTION  
COMPANY (a corporation),

*Plaintiff in Error,*

VS.

MODERN STEEL STRUCTURAL COM-  
PANY (a corporation),

*Defendant in Error.*

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## PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

---

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Plaintiff in error respectfully urges that the decision of this court affirming the judgment of the lower court be vacated and that there be a re-argument of this case.

In support of this petition, it urges the following considerations:

A careful analysis of the decision shows that the reasoning of the court in reaching its judgment of affirmance is as follows:

1. The objection that no damage is shown under the evidence does not present a reviewable question, because it does not appear that all the testimony submitted at the trial is contained in the bill of exceptions.

2. Petitioner contended that plaintiff (defendant in error) should have first maintained an action for goods sold and delivered and then by independent action sought damages for breach of contract. But as plaintiff was not required to split its demand and sue in one form of action for a part of its claim and in another for the balance, this contention cannot be maintained.

3. That the words "furnish" and "fabricate" are synonymous.

4. That if it were not for the fact that the proposal recites that the structural material shall be in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by Joseph D. Smedberg, identified with certain marks, *there could be no question that the general description contained in the two instruments would sufficiently identify the materials to be manufactured to make the contract valid in all respects.*

5. It was never contemplated that the drawings to be furnished by Smedberg should have been

made and completed prior to the making and acceptance of the proposal.

6. That the proposal was not to furnish any specific *and predetermined pieces of given size and dimensions.*

7. That the minds of contracting parties must draw together and become as one touching the subject matter and the terms and conditions before a contract can be consummated, but in the present case that is what was done, and the purpose of the parties was defined with sufficient definiteness that **there can be no mistake as to their intention touching the steel and iron to be fabricated and delivered.**

8. It was never intended that drawings and specifications should be attached to proposal.

We most respectfully contend that the above premises from which this court concluded that the judgment should be affirmed are without support in the record and that the reasoning of the court by which it finds that there was a contract, and a breach by this petitioner, is illogical and cannot be sustained.

In maintaining its contentions petitioner submits:

1. The bill of exceptions *affirmatively and emphatically* shows that *it contained all the testimony submitted at the trial.*

2. Petitioner *never* contended that plaintiff was required to split its demand and sue in one action for part of its claim and in another action for



the balance and this court misconstrued petitioner's position.

3. The word "furnish" as used in the proposal of plaintiff meant, and was intended to mean, the delivery of fabricated steel, or, as specified in the proposal, **"structural steel constructed in a workman-like manner"** (Tr. p. 2). In other words, the steel was to be fabricated into certain shapes, lengths and sizes before it was to be delivered.

4. Independent of the recital in the proposal that the structural material shall be in accordance with drawings furnished by Joseph D. Smedberg, identified with certain marks, the general description referred to in the opinion is absolutely insufficient to identify the material, and the contract would be void for uncertainty.

5. It was necessary that the general architectural drawings be finished before the contract was complete or valid.

6. The proposal required plaintiff to furnish steel to be fabricated into certain shapes and sizes and the statement in the court's opinion to the contrary is without support.

7. The minds of the parties never met on the subject matter of the contract and could not have met, because it was not in existence.

8. The drawings and specifications by express terms were intended to be an identified part of the contract.

## I.

**THE BILL OF EXCEPTIONS AFFIRMATIVELY SHOWS THAT IT CONTAINS ALL THE TESTIMONY SUBMITTED AT THE TRIAL.**

On the last page but one of the opinion the court say:

“Another objection urged is that no damage is shown under the evidence. This presents a question hardly reviewable in view of the certificate of the trial judge settling the bill of exceptions because it does not appear that all the testimony submitted at the trial is contained therein.”

This point was not made by the defendant in error for the obvious reason that the contrary appears.

At page two hundred and fifty-six (256) of the transcript of record at the end of the recital of the testimony is the following sentence:

*“This concluded the testimony and the foregoing constitutes all the evidence in the case.”*

The stipulation of counsel and the order of the court are made pursuant thereto (Tr. pp. 268-269).

It seems that the quoted portion of the court's opinion is clearly erroneous.

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II.

**PETITIONER NEVER CONTENDED THAT PLAINTIFF WAS REQUIRED TO SPLIT ITS DEMAND AND SUE IN ONE ACTION FOR PART OF ITS CLAIM AND IN ANOTHER ACTION FOR THE BALANCE THEREOF.**

On the last page but one of the court's opinion it is said:

“Beyond this view counsel presents the view that the action should have been for material sold and delivered, having reference to the 391¼ tons of steel fabricated, shipped and delivered to the plaintiff at San Francisco as shown by the evidence. This overlooks the fact that the defendant breached its contract by directing the plaintiff to discontinue the further fabrication of steel and iron and refused to allow it to proceed further in fulfillment of its undertaking. *The plaintiff was not required to split up its demand and sue in one form of action for a part and in another for a part. Indeed, if the plaintiff had sued as counsel suggests, the question might have arisen whether it thereby waived its action for the breach of the contract.*”

It is quite evident counsel's position is misunderstood. At no time did he advance such an argument. *He urged that there was no contract and in the absence of a valid contract plaintiff could not sue in damage for a breach of a contract which had no existence, but was forced to an action to recover the value of the materials sold and delivered.*

Counsel further argued that the present action could not be maintained as an action for damages for a breach of contract because:

- (a) There was no contract.
- (b) There was no evidence of damage.

But counsel admitted that if the present action could be regarded as an action for the value of materials sold and delivered that the judgment



of the lower court to the extent of the value of the steel delivered, viz.: \$3021.09 might be affirmed.

Nowhere, and at *no* time, did petitioner urge that the demand was divisible. On the contrary, it urged that plaintiff had an action for goods sold and delivered and not for damages for breach of a contract which had no legal existence.

(See Revised and Supplemental Brief, p. 91.)

---

### III.

**THE WORD "FURNISH" AS USED IN THE PROPOSAL MEANT AND WAS INTENDED TO MEAN THE DELIVERY OF FABRICATED STEEL AS SPECIFIED IN THE PROPOSAL.**

At page six of the opinion this court say:

"The questions to be determined are whether the alleged contract is sufficiently definite and certain in its description of the materials to be *manufactured and furnished*, and as it relates to quantity whether it was susceptible of being executed in accordance with intention of the parties."

And again at the end of said page:

"The general plan of construction is then delineated and the kind of material required and the character and finish thereof are specified *in minute detail*, so that there can be no mistake in construing these two instruments together touching the material *to be manufactured by the plaintiff and furnished* to the defendant for the construction of the theatre building."

These excerpts from the court's opinion are absolutely without support in the evidence. The

plaintiff (Modern Steel Structural Company) was a corporation organized for the special purpose of *manufacturing, fabricating and erecting steel structures* (Tr. pp. 75-76). By its proposal it was to manufacture and fabricate steel for the defendant (Tr. pp. 75-76). The proposal called for fabricated and not raw steel.

Where in the specifications or drawings is there any detail or drawing for the theatre building? **It was admitted that the general plan or design for the theatre portion of the building had not even been conceived.** The specifications state:

“The general plans of the theatre portion of the building being incomplete still, the intention is to erect the office building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams.”

(Specifications Tr. p. 108.)

The plaintiff's vice-president admitted the design for the theatre had never been prepared (Tr. p. 255).

Where, then, is the justification of that portion of the opinion quoted above and which reads:

“The general plan of construction is then delineated and the kind of material required and the character and finish thereof are specified in minute detail, so that there can be no mistake in construing these two instruments together touching the material to be manufactured by the plaintiff and furnished to the defendant for the construction of the theatre building.”

No one knew the design of the theatre. The architect had not made it. No one knew the size, form, shape or weight of any of the steel members that would enter into the theatre *when it was planned*. The specifications state that the plans for the theatre portion were never completed. The vice-president of plaintiff admitted they were never made. How then could plaintiff know how or what steel members to fabricate and finish? How could it know their sizes, forms or weights? Manifestly it could do no more than “*guess*” and this the law forbids.

---

#### IV.

Independent of the recital in the proposal that structural material shall be in accordance with drawings furnished by Joseph D. Smedberg and identified with certain marks, *the general description referred to in the opinion is absolutely insufficient to identify the material.*

It must not be forgotten that Frank T. Shea was the architect for the owner and Joseph D. Smedberg was the engineer employed by the owner under contract with the architect (Tr. p. 107).

The design or general plan is prepared by the architect and the detailed steel drawings are made by the engineer. Neither the plan, ~~and~~ <sup>nor</sup> ~~therefore~~ the detailed steel drawings for the theatre portion—the larger portion of the combined building—were made. The steel had to be fabricated according



to drawings which were based on an architectural design. This design was never made. How then could the steel which was to enter into this design be fabricated before the form or substance of the design was conceived?

If this is true, what becomes of the court's suggestion that the only doubt is suggested by the recital that the structural steel shall be in accordance with drawings furnished by Joseph D. Smedberg? Suppose the recital were omitted, what would guide plaintiff in fabricating the steel? Would it be free to follow drawings it might prepare and which would never fit in with the *architectural design to be prepared*? Manifestly without the plan and drawings there could be no contract.

---

## V.

**IT WAS NECESSARY THAT THE GENERAL ARCHITECTURAL  
DRAWING BE FURNISHED BEFORE THE CONTRACT  
COULD BE COMPLETE OR VALID.**

The opinion is written on the assumption that a quantity of steel was to be purchased without regard to any particular building. This is fundamentally wrong. A quantity of steel *to be fabricated in accordance with a design to be thereafter drawn was to be furnished*. Until the design was drawn the steel could not be fabricated. Who could say what character of a theatre the architect intended to design? We know theatres are as different architecturally as there are different

architects to conceive designs. Some have ponderous steel members. Some have great trusses. Some have great arches. Some have one, two or three galleries, while some are absolutely plain. Until the plan of the Columbia Theatre was prepared no one could conceive the size, shape, weight or appearance of the steel members which would enter into its construction. Then how could there be a valid contract to *fabricate* steel members the size, shape or weight of which were not even conceived in the architect's mind? The plan or design was never completed; hence there was no valid contract.

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## VI.

**THE PROPOSAL REQUIRED PLAINTIFF TO FURNISH STEEL TO BE FABRICATED INTO CERTAIN SHAPES AND SIZES, AND THE STATEMENT IN THE OPINION TO THE CONTRARY IS WITHOUT SUPPORT.**

The court's opinion at page eight reads:

*“It must be remembered that the proposal was to furnish steel and iron by its weight and not to furnish any specific and predetermined pieces of given size and dimensions, \* \* \*”*

This premise is wholly without support in the testimony. It is largely responsible for the court's conclusion of affirmance. With it must fall the affirmance of the judgment. *The contrary is true.* Plaintiff was required to purchase the steel at the mills and take it to its plant at Waukesha and there cut the beams to the required length and

assemble all the parts. Either that or it would have the work done at the mill. In either event the steel to be furnished to defendant was to be fabricated in sizes, shapes and weights to be determined by the general plan which was never prepared. There was no agreement for a definite amount of *fabricated* or *unfabricated* steel. The amount, sizes and shapes were to be taken from the plan which was never prepared. The figures fifteen hundred tons represent plaintiff's guess. It is not mentioned in the proposal. Convincing proof that it was a guess is given from the testimony where it appears the president of plaintiff frequently changed his opinion on the amount. (Tr. pp. 130, 131; 224, 227).

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## VII.

### THE MINDS OF THE PARTIES NEVER MET ON THE SUBJECT MATTER OF THE CONTRACT AND COULD NOT HAVE MET BECAUSE IT WAS NEVER IN EXISTENCE.

The theatre was the larger part of the combined office and theatre building. Its design was never made. No one could even hazard a guess what it would be. The plaintiff made a proposal that was unlimited as to quantity, except by the design to be made by the architect. This design according to the construction required—whether truss, cantilever or plain—would require more or less steel and the cost of the fabrication would be greater or less according to the features, whether plain or



complex; whether arches, galleries and boxes or not; all these were essential parts of the contract and until they had been agreed on there was no meeting of minds.

The citations contained in the revised and supplemental brief show there is no contract here.

(See pp. 64-74.)

None of these authorities was mentioned or discussed in the opinion.

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### VIII.

**THE DRAWINGS AND SPECIFICATIONS WERE INTENDED TO BE AN IDENTIFIED PART OF THE CONTRACT.**

The court at page eight of the opinion say:

“It is next insisted that the contract was not legally consummated because the drawings and specifications were not attached to the proposal.  
\* \* \* It was never intended that they should be attached to the proposal.”

The proposal copied in the court's opinion distinctly refers to and makes certain drawings and specifications part of it.

The petitioner's contention in this regard admitted that some of the terms and conditions of a contract need not appear in the contract itself, but may be referred to as being contained in an attached document. Still where such reference is made to a document as being attached, or as *being signed or identified by marks or otherwise,*

and it is not “attached” “signed” or so “identified”, *the contract is void*:

Because in such case the reference is false, and cannot be helped out by parol. This is unquestionably the rule, to which as yet there appears no exception.

(Brief, pp. 76-78.)

The specifications received in evidence were not the specifications referred to in the proposal.

We respectfully submit that the decision of this court should be vacated and the case reargued.

WILLIAM F. HUMPHREY,  
*Attorney for Plaintiff in Error  
and Petitioner.*

LENT & HUMPHREY,  
*Of Counsel.*

---

#### CERTIFICATE OF COUNSEL.

William F. Humphrey, the attorney for the within named plaintiff in error and petitioner, does hereby certify that in his judgment the foregoing petition for a rehearing is well founded; and does hereby further certify the said petition is not intended for delay.

WILLIAM F. HUMPHREY,  
*Attorney for Plaintiff in Error  
and Petitioner.*

United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

---

PAUL I. WELLES and JOHN DANIEL, Trustee of  
METROPOLIS CONSTRUCTION COMPANY, a  
Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-  
CISCO, a Corporation,

Appellee.

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**Transcript of Record.**

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Upon Appeals from the United States District Court for  
the Northern District of California, First Division.

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**FILED**

JUL 1 - 1913





No. 2273

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PAUL I. WELLES and JOHN DANIEL, Trustee of  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**Names and Addresses of Attorneys of Record.**

C. A. S. FROST, Humboldt Bank Building, San Francisco, California,

Counsel for Appellant Paul I. Welles.

A. F. MORRISON, P. F. DUNNE and W. I. BROBECK, Crocker Building, San Francisco, California; GAVIN McNAB, Merchants National Bank Building, San Francisco, California; B. M. AIKINS, Metropolis Bank Building, San Francisco, California, and MILTON J. GREEN, Mills Building, San Francisco, California,

Counsel for Appellant John Daniel, Trustee, etc.

KNIGHT & HEGGERTY, Crocker Building, San Francisco, California; JAMES B. FEEHAN, Humboldt Bank Building, San Francisco, California, and JOSEPH W. BERETTA, Humboldt Bank Building, San Francisco, California, Counsel for Appellee.

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*In the District Court of the United States, in and for the Northern District of California.*

No. 15,148.

PAUL I. WELLES,

Complainant,

vs.

JOHN DANIEL, Trustee of the Estate of METROPOLIS CONSTRUCTION COM-



PANY, a Corporation, Bankrupt, PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation, and THOMAS F. BOYLE,

Defendants.

**Praeceptum [for Transcript of Record].**

To the Clerk:

You are requested to make a Transcript of Record, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal granted in the above-entitled cause, and to include in said Transcript of Record the following papers and exhibits:

1911.

April 18. Bill of Complaint.

“ 19. Order to Show Cause.

May 24. Amendments to Bill of Complaint.

June 20. Return of Portuguese-American Bank.

“ 27. Amended Return of Portuguese-American Bank.

July 3. Exceptions to Amended Return of Portuguese-American Bank.

“ 3. Amended Return and Answer of Thomas F. Boyle. [1\*]

1911.

July 11. Order Case Referred to A. B. Kreft, etc.

“ 11. Replication of Complainant to Answer of Thomas F. Boyle.

1911.

Sept. 5. Answer of John Daniel, Trustee, etc.

Oct. 6. Answer of Portuguese-American Bank.

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\*Page-number appearing at foot of page of original certified Record.

- Oct. 14. Report of Referee.  
Statement of Evidence Taken Before  
Referee (filed herewith and to be set-  
tled).
- “ 16. Replication of Paul I. Welles to Answer  
of Portuguese-American Bank.
- “ 25. Replication of Paul I. Welles to Answer  
of John Daniel.
- Dec. 12. Order Complainant Entitled to Relief  
Demanded.
- “ 13. Order Approving Report.
- “ 18. Writ of Injunction and Return.
- “ 26. Order Case Referred to A. B. Kreft.
- 1912.
- Mch. 8. Report on Reference.
- Apl. 15. Order Cause Referred to A. B. Kreft.
- “ 15. Amendment to Prayer of Bill.
- “ 15. Order Allowing Amendment to Prayer  
of Bill.
- July 16. Report of Special Referee.
- Aug. 14. Exceptions of Paul I. Welles.
- “ 16. Exceptions of John Daniel.
- Sept. 4. Order Submitting Report and Excep-  
tions in Briefs. [2]
- 1912.
- Dec. 19. Order Submission Set Aside and Cause  
Restored to Calendar.
- 1913.
- Jan. 18. Order Cause Submitted on Briefs on File.
- “ 18. Opinion Confirming Report of Referee.
- “ 18. Order Report Confirmed in Favor of  
Portuguese-American Bank.

Jan. 30. Decree.

Feb. 4. Notice of Petition for Severance.

“ 4. Petition for Appeal of John Daniel,  
Trustee.

“ 4. Assignment of Errors of John Daniel,  
Trustee.

1913.

Feb. 8. Petition of Paul I. Welles for Appeal.

“ 8. Assignment of Errors of Paul I. Welles.

“ 8. Consent of Paul I. Welles to Unite in  
Appeal.

“ 10. Order Granting Appeal, Severance, and  
Allowing Supersedeas.

“ 13. Bond of Complainant on Appeal, with  
Order Approving Same.

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant  
and Appellant. [3]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant and  
Appellant.



Receipt of a copy of the within Praeceptum this 20th day of February, 1913, is admitted.

JAMES B. FEEHAN,  
KNIGHT & HEGGERTY,  
Attorneys for Defendant Portuguese-American  
Bank.

EDWARD F. MORAN,  
Attorney for Defendant Thomas F. Boyle.

Filed Feb. 21, 1913. [4]

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[Title of Court and Cause.]

**Supplemental Praeceptum [for Transcript of Record].**  
To the Clerk:

You are requested to include in the Transcript of Record, made by you, to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the Appeal granted in the above-entitled cause, the following papers:

May 1, 1911. Return of United States Marshal on  
Order to Show Cause.

July 11, 1911. Order Restraining Portuguese-  
American Bank from Prosecuting Mandamus  
Proceedings.

December 13, 1911. Order Granting Complainant  
Injunction *pendente lite*, etc.

December 26, 1911. Minute Order, Referring Cause  
to Referee upon the Issues Arising upon the  
Pleadings.

April 15, 1912. Order Referring Cause to Special Referee and Examiner to Report on Testimony Taken, etc.

February 10, 1913. Citation and Return.

A. F. MORRISON, [5]  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant and Appellant.

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant and Appellant.

A copy of the within paper received this 8th day of May, 1913.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Attorneys for the Defendant and Respondents.  
Filed May 10th, 1913. [6]

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[Title of Court and Cause.]

**Praecipe of Portuguese-American Bank [as to Transcript of Record].**

To the Clerk:

You are requested to incorporate into the Transcript of Record on appeal in the above-entitled matter the following papers and exhibits:

Exceptions of Defendant Portuguese-American Bank of San Francisco to Referee's Report on Final

Hearing filed April 6th, 1912.

Defendant Portuguese-American Bank's Exhibits 1, 2, 3, 4, 5 and 6, accompanying report of Referee dated October 16, 1911.

March 3d, 1913.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Solicitors for Portuguese-American Bank of San  
Francisco, Defendant and Appellee. [7]

Received a copy of the within Praecipe this 3d day  
of March, 1913.

MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
M. J. GREEN,

Attorneys for John Daniel.

C. A. S. FROST,  
Attorney for Paul I. Welles.

Filed Mar. 3, 1913. [8]

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[Title of Court and Cause.]

**Bill of Complaint.**

(By Claimant in Bankruptcy Against Trustee in  
Bankruptcy, a Stakeholder and Alleged Equitable  
Assignee; to Collect Stake Adjudicate Priorities, and  
Enjoin Summary Proceeding in State Court.)

To the Honorable District Court of the United States  
for the Northern District of California, and to  
the Honorable JOHN J. DE HAVEN, Judge of  
said Court:

The Bill of Complaint of Paul I. Welles, a citizen



of the United States and of the State of California, and a resident of Berkeley, in the Northern District of said State, against John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, Defendants, respectfully shows:

I.

That complainant is a citizen of the United States and of the State of California and a resident of Berkeley in the Northern District of said State; that he is a party to the [9] bankruptcy proceedings hereinafter mentioned, and has filed therein his claim as a secured creditor; and that said claim has been approved and allowed.

II.

That the City and County of San Francisco is, and, at all the times herein mentioned, continuously, has been a municipal corporation of the State of California duly organized and existing under and governed by a certain Charter adopted by the people of said City and County on the 26th day of May, 1898, and approved by the Legislature of the State of California on the 26th day of January, 1899; and that Thomas F. Boyle, defendant herein is, and, at all the times herein mentioned, continuously, has been the duly elected, qualified and acting Auditor of said City and County of San Francisco.

III.

That Metropolis Construction Company is, and at all the times herein mentioned continuously has been a corporation organized and existing under and by

virtue of the laws of the State of California.

#### IV.

That a petition praying that Metropolis Construction Company, a corporation, be adjudged bankrupt was duly and regularly filed in the District Court of the United States for the Northern District of California on December 19th, 1910; that thereafter and on January 5th, 1911, said corporation was, by order of said Court herein, duly given and made, adjudged bankrupt; and thereafter and on said last mentioned day the matter of said bankruptcy was, by said Court, by its order duly given and made, referred to the Honorable Armand B. Kreft, Referee in Bankruptcy herein. [10]

That, on February 1st, 1911, at the first meeting of creditors, duly and regularly called and held before said Referee in Bankruptcy, John Daniel was appointed Trustee of the estate of said bankrupt by order of said Referee; that thereafter and on said February 1st, 1911, said John Daniel made and filed herein his oath of office and the bond required by law and the order of said Referee as such trustee; that he thereupon became, ever since continuously has been, and now is the duly appointed, qualified and acting Trustee of the estate of said bankrupt.

#### V.

That defendant, Portuguese-American Bank of San Francisco, is a banking corporation duly organized, acting and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.



## VI.

That on or about the 22d day of July, 1910, the City and County of San Francisco entered into a contract with said Metropolis Construction Company for the construction of certain sewers and appurtenances in Kentucky Street, from Channel Street South, in said City and County of San Francisco; a copy of said contract is hereunto annexed, marked Exhibit "A" and made part hereof.

## VII.

That thereafter the Metropolis Construction Company proceeded with the construction work under said contract, and on the 5th day of September, 1910, the City Engineer of said City and County of San Francisco made an estimate of the value [11] of the labor done and materials incorporated in said sewers and appurtenances since his last preceding estimate thereof was made, and he estimated the same at Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, and thereupon the sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6830.85) Dollars, being seventy-five per cent (75%) of said Nine Thousand One Hundred Seven and Eighty One Hundredths (\$9107.80) Dollars, became due subject to the terms of said contract and laws of California to said Metropolis Construction Company from said City and County of San Francisco as a progressive payment on account of said contract; that said payment is called the fourth (4th) progressive or progress payment; that the Board of Public Works of the City and County of San Francisco approved said



estimate on the 5th day of December, 1910, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars; that said demand was approved by said Board of Public Works on December 5th, 1910; that thereafter, on January 3d, 1911, the Board of Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on January 4th, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board, department and committee required by law to act thereon. [12]

That said demand upon the treasury was presented to said defendant Thomas F. Boyle as Auditor of said City and County of San Francisco on or about January 6th, 1911, and is now in the possession of said defendant for his approval and allowance; that, prior to the commencement of this action, defendant Trustee made demand upon said defendant Boyle that he approve and allow said demand and deliver the same to defendant Trustee; that said defendant Boyle has failed and refused, and still fails and refuses, to approve or allow said demand or to deliver the same to defendant Trustee; that he has not any

good or sufficient reason for so doing; on the contrary, that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, is not immediately delivered by defendant Boyle to said defendant Trustee is that there exists some doubt in the mind of defendant Boyle as to whether said Trustee or complainant or said defendant bank is the one rightfully entitled thereto.

That defendant Trustee is legally entitled to the possession of said fund, subject to whatever rights therein said complainant or defendant bank may have. [13]

### VIII.

That thereafter the construction work under said contract was continued and finally completed February 1st, 1911; that thereafter and prior to filing this Bill of Complaint the City Engineer of said City and County of San Francisco made an estimate of the value of the labor done and materials incorporated in said sewers and appurtenances since his last preceding (the said fourth) estimate thereof was made including the twenty-five (25) per cent withheld un-



der said contract, and he estimated the same at Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and thereupon said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, being the amount of the fifth (5th) progress payment and also the final payment, under said contract, became due subject to the conditions and laws aforesaid, to said Metropolis Construction Company from said City and County of San Francisco; that the Board of Public Works of the City and County of San Francisco approved said estimate and finally accepted said construction work on the 29th day of March, 1911, by its resolution then and there duly made and adopted.

That said Metropolis Construction Company presented its verified demand on the treasury of said City and County of San Francisco for said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars; that said demand was approved by said Board of Public Works on March 29, 1911, that thereafter, on April 10, 1911, the Board of [14] Supervisors of said City and County of San Francisco, by resolution of said Board duly and regularly adopted, approved said demand and authorized the payment thereof to be made out of the fund provided by law; that thereafter and on April 11, 1911, said demand was approved by the Mayor of said City and County.

That said demand upon the treasury and the payment thereof has been allowed by every officer, board,



department and committee required by law to act thereon.

That said demand upon the treasury was presented to said Thomas F. Boyle as Auditor of said City and County of San Francisco on or about April 12, 1911.

That thereafter and prior to the filing of this Bill of Complaint said Trustee in Bankruptcy, John Daniel, defendant herein, made demand upon said Auditor that he approve and allow said demand of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars and deliver the same to said Trustee; that then and there said Auditor delivered said demand to said Trustee, who immediately received the money therefor from the Treasurer of said City and County; and that said sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, and the whole thereof, then immediately passed into the possession of said Trustee, who thereupon paid out said sum as follows: The sum of Five Thousand Three Hundred Sixty-seven and Forty-three One Hundredths (\$5,367.43) Dollars in satisfaction of, and which did satisfy, all claims against any and all said moneys payable by said City and County to said bankrupt and in the hands of defendant Boyle, save the claims of complainant and the alleged assignment of defendant bank, and the balance of said sum, to wit: Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars to complainant [15] on account of said bankrupt's indebtedness to him; all persons having claims or liens against said moneys

in the hands of defendant Boyle save said Bank, having consented in writing, and they did consent, to the transfer of all said funds to defendant Trustee.

IX.

That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein.

X.

That said defendant, Portuguese-American Bank of San Francisco, claims some right to said moneys by virtue of an alleged assignment thereof from said bankrupt; but that, defendant bank has no assignment, as complainant is informed and believes and, therefore, alleges, and no right whatever to said moneys nor any part thereof.

XI.

That said contract, dated July 22, 1910, between said City and County of San Francisco and said bankrupt, contained specifications, a complete copy whereof is annexed to complainant's verified claim on file in said bankruptcy proceedings, but which are too voluminous to repeat here, which said specification contains, among other things, the following provisions:

In order to assist the contractor to prosecute the work advantageously, the City Engineer, shall on or about the last day of each month, make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.



The first estimate shall be of the value of the labor [16] done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part, and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$15,000.00. Such estimate need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications.

No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable un-



der this contract or his claim thereto, unless with the like consent of the Board of Public Works. [17]

XIa.

That said Board of Public Works never gave consent to any assignment of defendant bank.

XII.

That on July 30, 1910, said Metropolis Construction Company, a corporation made and entered into an agreement, with complainant, wherein and whereby it was then and there agreed that complainant was to do all of the construction work in said sewers and appurtenances for a price therein agreed to be paid complainant; a copy of said agreement of July 30, 1910, is annexed hereto, marked "Exhibit B" and made part hereof.

XIII.

That said Paul I. Welles has completed the construction of said sewers and appurtenances at Fourth and Kentucky Streets and that he has fully complied with all the terms and conditions of his said agreement with said bankrupt, and also all the terms and conditions of the agreement between said bankrupt and said City and County for the construction of said sewers and appurtenances by said bankrupt agreed to be kept and performed; that said work has been approved and accepted by the said City and County of San Francisco.

XIV.

That there now remains due and owing said Paul I. Welles from said Metropolis Construction Company the sum of \$19,844.65; that said last-mentioned sum is not subject to any setoffs or any counterclaims

on behalf of said bankrupt save certain moneys as are now due and owing from said Welles [18] to said bankrupt for said materials purchased by said Welles from said bankrupt, namely \$6,834.39; that said last-mentioned offset is subject to deductions on behalf of said Welles in certain amounts which have been paid or which must be paid out of the moneys due from said City and County for the construction of said sewers to materialmen who served notices to withhold, under said section 1184, upon said City and County, amounting to the sum of \$5,367.42; and that there is now due and owing said Paul I. Welles from said bankrupt, after said notices to withhold shall be paid, \$14,477.23, free from all setoffs or counter-claims whatsoever; except as above stated, and the payment on April 14, 1911, of the sum of Five Thousand Seven Hundred Eighty-two and Twenty-one One Hundredths (\$5,782.21) Dollars, mentioned in paragraph VIII hereof.

#### XV.

That on December Tenth, Nineteen Hundred Ten, complainant made a written notice to the owner, the said City and County of San Francisco, and to the Mayor and Board of Supervisors and Board of Public Works thereof, and to said bankrupt, that he had performed labor and furnished labor and materials to said bankrupt, and had agreed so to perform and furnish, stating in general terms the matters and things required to be stated in such a notice by section number One Thousand One Hundred Eighty-four (1184) of the Code of Civil Procedure of the State of California to which reference is hereby



made, a copy of which said notice is annexed hereto, marked "Exhibit C" and made part hereof.

That said written notice was served upon said City [19] and County, and upon said Board of Supervisors, and upon said Mayor, and upon said Board of Public Works and upon said bankrupt, and upon the Auditor of said City and County on December Twelfth (12th) 1910.

#### XVI.

That on December Fifteenth, Nineteen Hundred Ten, complainant made a written notice, called "Amended Stop Notice and Notice of Claim of Paul I. Welles," to said owner, said City and County of San Francisco, and to the officers, boards and corporation, mentioned in the paragraph XV, last preceding, similar in form and substance to the written notice mentioned in said paragraph XV, a copy of which said notice is annexed hereto, marked "Exhibit D" and made part hereof;

That said "amended" notice was served upon said City and County and upon said Mayor and upon said Board of Supervisors, and upon said Board of Public Works, and upon the Auditor of said City and County on December Sixteenth (16th), 1910, and upon said bankrupt on December Twenty-second (22d), 1910.

#### XVII.

That on March First, Nineteen Hundred Eleven, complainant made, verified and filed herein before said Honorable A. B. Kreft, Referee in Bankruptcy, his claim against said bankrupt, alleging and stating said contract, indebtedness, notices, service of



same, and securities, claiming priority as a secured creditor, to which reference is hereby made.

That on April Thirteenth, Nineteen Hundred Eleven, [20] said claim was by said Referee allowed and approved as a secured claim against said bankrupt, and its estate, in the sum of Nineteen Thousand Eight Hundred Forty-four and Sixty-five One *Hundred* (\$19,844.65) Dollars, subject to offset in favor of said bankrupt as stated in paragraph number XIV hereof.

#### XVIII.

That the total amount of money remaining available on said contract, part of which (\$11,149.64) is in possession of defendant Trustee and part in possession of defendant Boyle for account of said bankrupt, is Seventeen Thousand Nine Hundred Eighty and Forty-nine One Hundredths (\$17,980.49) Dollars, which is insufficient to pay the claim of complainant against said bankrupt in full; and that complainant is entitled, by virtue of said prior right, to the whole thereof; but that defendant Trustee denies said claim in part, and asserts that he is entitled thereto for the general creditors of said bankrupt.

#### XIX.

That out of said Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars received by said Trustee, as alleged in paragraph VIII hereof, all claims against said fund, whatsoever, have been paid and discharged, save only said claim of said defendant, Portuguese-American Bank of San Francisco, as alleged, also, in paragraph XIV hereof.

XX.

That the charter of the City and County of San Francisco, to which reference is hereby made, provides, among other things: [21]

Art. II—Chap. I—Sec. 13.

Every bill or resolution providing for any specific improvement, or the granting of any franchise or privilege, or involving the lease, appropriation or disposition of public property, or the expenditure of public money, except sums less than two hundred dollars, or levying any tax or assessment, and every ordinance providing for the imposition of a new duty or penalty, shall, after its introduction, be published in the official newspaper, with the ayes and noes, for at least five successive days (Sundays and legal holidays excepted) before final action upon the same. If such bill be amended, the bill as amended shall be in cases of great necessity the officers and heads of departments may, with the consent of the Mayor, expend such sums of money, not to exceed two hundred dollars, as shall be necessary to meet the requirements of such necessity.

Art. II—Chap. I—Sec. 19.

Except as provided in Chapter III of Article III of this Charter, all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the Treasurer, be first approved by the Board of Supervisors. All demands for more than two hundred dollars shall be presented to the Mayor for his approval, in the manner hereinbefore provided for the passage of bills or reso-

lutions. All resolutions directing the payment of money other than salaries of wages, when the amount exceeds five [22] hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper.

Art. III—Chap. I—Sec. 15.

The Supervisors shall authorize the disbursement of all public moneys, except as otherwise specifically provided in this Charter.

Art. IV—Chap. I—Sec. 3.

\* \* \* \* \*

The Mayor shall from time to time recommend to the proper officers of the different departments such measures as he may deem beneficial to public interest. He shall see that the laws of the State and ordinances of the City and County are observed and enforced. He shall have a general supervision over all the departments and public institutions of the City and County, and see that they are honestly, economically and lawfully conducted, and shall have the right to attend the meetings of any of the Boards provided for in this Charter, and offer suggestions at such meetings.

Art. VI—Chap. I—Sec. 7.

The Board\* shall be the successor in office and shall have all the powers and perform all the duties of the Superintendent of Streets, Highways, and Squares, of the New City Hall Commissioners, and of the commission in existence at the time this Charter goes [23] into effect for the opening, extending, widening, narrowing, straightening, (\*of Public Works.)



closing or changing the grades of streets in the City and County.

XXI.

That on or about the 26th day of January, 1911, said Portuguese-American Bank of San Francisco made and filed in the Superior Court of the State of California, in and for the City and County of San Francisco, its petition wherein and whereby it set forth its alleged claim to the possession of said demands and the proceeds thereof, and wherein and whereby it prayed that said Thomas F. Boyle be required to deliver possession thereof to it; that said petition is numbered 33836 in the records and files of said Superior Court; that thereupon said Superior Court gave and made its alternative mandate directed to said Thomas F. Boyle as Auditor of said City and County of San Francisco, requiring him immediately to audit and approve said demands and to deliver the same to said Portuguese-American Bank of San Francisco, a corporation, or to show cause before said Superior Court, on the 9th day of February, 1911, at 10 o'clock A. M., why he had not done so; that thereafter and on said 9th day of February, 1911, the said proceeding was continued upon the motion of said Portuguese-American Bank of San Francisco, a corporation, until the 19th day of April, 1911, at 10 o'clock A. M., at which time said Thomas F. Boyle is required to appear and to do as in said alternative writ of mandate commanded.

That said application for a writ of mandate is a summary proceeding and that said State Court has

no jurisdiction therein to hear nor determine conflicting claims to said funds [24] and that neither complainant nor said Trustee is a party to said mandamus proceeding.

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant Trustee said Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this court, to make answer hereunto and to assert herein its claim, if any it have, upon said moneys and to abide the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained; and for such other and further relief as may be according to equity and good

conscience; and that complainant be allowed his costs and disbursements herein by him expended.

Dated: San Francisco, April 17, 1911.

PAUL I. WELLES,  
Complainant.

C. A. S. FROST,

Attorney for Complainant. [25]

[Duly verified April 17, 1911.] [26]

**Exhibit "A" [to Bill of Complaint—Agreement,  
Dated July 22, 1910].**

**SEWER CONSTRUCTION.**

**BOND ISSUE, 1904, CONTRACT No. 6-A.**

**RESOLUTION OF AWARD, No. 5455. (Second  
Series).**

THIS AGREEMENT, made this 22d day of July, A. D. 1910, by and between Metropolis Construction Co. of the City and County of San Francisco, State of California, the party of the first part, and the BOARD OF PUBLIC WORKS of the CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, under and by virtue of the authority granted to it as such by Article VI of the Charter of the City and County, approved January 19th, 1899, the party of the second part.

WHEREAS, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 8th day of July, A. D. 1910, has been awarded the contract for the work hereinafter mentioned;

NOW, THEREFORE, THESE PRESENTS WITNESSETH, That the said party of the first



part, for and in consideration of the premises aforesaid and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will do and perform, in a good and workmanlike manner, under the direction and to the satisfaction of the said Board of Public Works, and will prosecute with diligence from day to day to completion, and will furnish the materials used in the execution and completion thereof, to [27] the satisfaction of the said Board of Works, all the following work in the said City and County of San Francisco, to wit:

The construction of sewers and appurtenances in Kentucky and Fourth Streets.

Said work to be commenced within 15 calendar days and completed within 150 calendar days from the date of contract, as specified in the notice inviting proposals therefor.

Said work shall be done according to the specifications hereunto annexed and made a part of this contract, and the materials used therein shall comply with the said specifications.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, to said party of the first part, for the work aforesaid, the following price, to wit:

(Price of each unit of work is inserted here.)

Progressive payments for said work to be made, as provided for in the specifications therefor.

And it is further understood and agreed by and between parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section I, Chapter III, Article II of the Charter of the said City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be two (2) dollars a day. [28]

Also, it is agreed and understood by the parties to this agreement, that in no case except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the work aforesaid.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

[Seal M. C. Co.]

METROPOLIS CONSTRUCTION CO.,  
INC.

By CHRIS EMILLE. [Seal]

Signed, sealed and delivered in the presence of

MICHAEL CASEY, [Seal]

W. A. NEWSOM, [Seal]

P. FREDERICK, [Seal]

Commissioners, Board of Public Works of the City  
and County of San Francisco.

[Seal B. P. W.]

Executed in triplicate. [29]



**Exhibit "B" [Agreement, Dated July 30, 1910].**

THIS AGREEMENT, made and entered into this 30th day of July, A. D. 1910, by and between PAUL I. WELLES, of the City and County of San Francisco, State of California, hereinafter known as the party of the first part, and the METROPOLIS CONSTRUCTION COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of California, hereinafter known as the party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the covenants and agreements hereinafter set forth and contained, promises and agreed to and with the said party of the second part that the said party of the first part will construct the concrete and pipe sewer from the Channel on Fourth Street in the City and County of San Francisco thence up, in and along Fourth Street to and with the intersection of said Fourth Street to its intersection with Sixteenth Street, together with all man-holes, "Y" branches, piling and all necessary connections, all of said work to be done and performed in a good and workmanlike manner and to the satisfaction of the Board of Public Works of the City and County of San Francisco, State of California, and to furnish all of the materials and labor necessary to carry on and complete the work mentioned in the plans and specifications and contract heretofore entered into between the City and County of San Francisco and the party of the second part, for the construction of sewers and appurten-



ances in Fourth Street and Kentucky Street from Channel Street to Sixteenth Street in said City and County, a copy of which said plans and specifications being hereto attached and made a part of this agreement, the said contract heretofore referred as having been entered into between said second [30] party and said City and County of San Francisco, being dated the —— day of ———, A. D. 1910.

It is agreed by and between the parties hereto that the party of the first part is to furnish all of the material and labor necessary to do all of the said work, all to be done in strict accordance with the plans and specifications aforesaid which are hereto annexed, made a part of this contract, and marked Exhibit "A."

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the party of the first part will purchase from the party of the second part and the party of the second part agrees to sell at marked cost, to the party of the first part all materials which may be used by the party of the first part in the doing and the performing of all of the work hereinbefore mentioned and all the materials to be furnished which will actually enter into the aforesaid work.

IT IS FURTHER AGREED between the parties hereto that the party of the second part will pay to Moriarty & Company out of the moneys and payments due or to become due to the party of the first part for the work and labor done and materials furnished under this contract whatever sum of sums of money that may be now due or to become due to the

said firm of Moriarty & Company for the doing of the piling work under their contract with the party of the first part herein.

The party of the second part agrees to pay the party of the first part for all work done and materials furnished, as follows, to-wit:

Ninety (90%) per cent of the sum of \$33,182.00; that is to say, ninety (90%) per cent of any sum lesser or greater than said sum of \$33,182.00 to be received by said second [31] party from the City and County of San Francisco, under its contract, with said City and County aforesaid; it being understood by and between the parties hereto that as the contract of said second party with the said City and County of San Francisco is based on unit prices and quantities and that therefore the sum to be received by said second party from said City and County might vary somewhat from the sum last named. Said ninety per cent (90%) aforesaid to be paid said first party by said second party in the manner following, to-wit: Eighty (80) per cent of the sum received by the second party at the times it receives its payments under its contract with said City and County of San Francisco, the balance of said ninety (90) per cent to be paid said first party, when the second party receives its final payment under its contract with City and County of San Francisco.

It is understood all work to be done under super-

vision of Metropolis Construction Co. or its representative.

Time is and shall be of the essence of this contract.

PAUL I. WELLES. [Seal]

METROPOLIS CONSTRUCTION COM-  
PANY, INC.

By CHRIS O. MILLER,  
President.

[Corporate Seal]

By A. W. REMICKE,  
Treasurer. [32]

**Exhibit "C" [Stop Notice and Notice of Claim].**

\$8,500.

PAUL I. WELLES,

versus

METROPOLIS CONSTRUCTION CO., a Corporation, EMPIRE STATE SURETY CO., a Corporation, the CITY AND COUNTY OF SAN FRANCISCO, California, a Municipal Corporation, the BOARD OF SUPERVISORS of said City and County and the BOARD OF PUBLIC WORKS thereof.

**STOP NOTICE AND NOTICE OF CLAIM.**

To the City and County of San Francisco, State of California, a Municipal Corporation, and to the Mayor thereof, and to the Board of Supervisors Thereof, and to the Board of Public Works Thereof, and to METROPOLIS CONSTRUCTION CO., a Corporation, and to EMPIRE STATE SURETY CO., a Corporation.



You and each of you are hereby notified that Paul I. Welles, did, at the times and in the manner hereinafter mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a sewer and appurtenances in Fourth and in Kentucky Streets at and near the intersections of said streets, in the City and County of San Francisco, State of California, which said sewer and appurtenances is partially completed and is now (December 10, 1910) under construction on land belonging to the said City and County of San Francisco, to-wit: in [33] Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco;

AND THAT said City and County of San Francisco, is the OWNER of said streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety in the sum of

Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Works," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [34]

AND THAT, between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles to furnish labor and materials and to do all the construction work upon said sewer and appurtenances, and to do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., exception however, that as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work,



and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co. An inspection of the original of which contract, is hereby tendered to you and said contract is open to your inspection at any time that you may designate.

That in accordance with said sub-contract so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the 10th day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets in accordance with the terms of the contract [35] made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work under and by virtue of his sub-contract with said Metropolis Construction Co. down to and inclusive of the present time and the date of this notice.

That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed in the building and construction of said sewers and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco through its Board of Public Works and said Metropolis Construction Co.



That under and by virtue of the terms of said sub-contract so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said sub-contract for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Eighty-five Hundred (\$8500) Dollars, and that no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said sub-contract and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco through its Board of Public Works.

That the work and labor performed and materials furnished by said Paul I. Welles amounting to said sum of Eighty-five Hundred Dollars has all been inspected and accepted by the City Engineer and the same has been approved by the Board of [36] Public Works of the City and County of San Francisco, for the purpose of estimating the payment to be made by the City and County of San Francisco, to the Metropolis Construction Co. as a progress payment for work performed under the terms of the contract between said City and said Metropolis Construction Co. for the month of November, 1910. That said progress payment which has been accepted by said City Engineer and approved by said Board of Public Works, and as said Paul I. Welles is in-

formed and believes and therefore allèges, is about to be paid to the said Metropolis Construction Co. amounts to the sum of \$6,830.85.

WHEREFORE, you, the said City and County of San Francisco, and you the said Mayor thereof, and you, the said Board of Supervisors thereof, and you the said Board of Public Works thereof, and you said Metropolis Construction Co., a corporation, and you, said the Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Eighty-five Hundred (\$8500) Dollars to said Paul I. Welles, in full;

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; [37]

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said act of the legislature, ap-



proved March 27th, 1897, mentioned on page two hereof, and to hold you and each of you liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated December 10, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel,

1304 Humboldt Bank Building. [38]

**Exhibit "D" [Amended Stop Notice and Notice of Claim].**

\$19,867.80.

PAUL I. WELLES,

versus

METROPOLIS CONSTRUCTION CO., a Corporation, EMPIRE STATE SURETY CO., a Corporation, the CITY AND COUNTY OF SAN FRANCISCO, California, a Municipal Corporation, the BOARD OF SUPERVISORS of Said City and County, and the BOARD OF PUBLIC WORKS Thereof.

**AMENDED STOP NOTICE AND NOTICE OF CLAIM OF PAUL I. WELLES.**

To the City and County of San Francisco, State of California, a Municipal Corporation, and to the Mayor thereof, and to the Board of Supervisors Thereof, and to the Board of Public Works Thereof, and to METROPOLIS CONSTRUCTION CO., a Corporation, and to EMPIRE STATE SURETY CO., a Corporation.

You and each of you are hereby notified that Paul



I. Welles did, at the times and in the manner hereinafter mentioned, furnish and supply labor, materials and supplies to be used, and which were actually used, in the building and construction of a concrete and pipe sewer and appurtenances, from the Channel on Fourth Street, in the City and County of San Francisco, thence up, in, and along Fourth Street to and with the intersection of said Fourth Street with Kentucky Street, thence in and along said Kentucky Street to its intersection with Sixteenth Street, in the City and County of San Francisco, State of California, which said sewer and appurtenances is [39] partially completed and is now (December 10, 1910) under construction on land belonging to said City and County of San Francisco, to-wit: in Fourth Street and in Kentucky Street at and near the intersection of said streets, in the said City and County of San Francisco, as aforesaid;

AND THAT said City and County of San Francisco, is the OWNER of said Streets which are regularly dedicated and accepted streets, and, as such owner, did cause said sewer and appurtenances to be constructed and the said labor and work done and materials furnished, and, in that behalf, did, to-wit: on the eighth (8th) day of July, 1910, by and through the Board of Public Works of the said City and County of San Francisco, duly award to Metropolis Construction Co., a corporation, a contract to do and perform, in the said City and County, the said building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and did, to-wit: on July 22d, 1910, duly accept the bond

of said Metropolis Construction Co., a corporation, as principal, and the Empire State Surety Co., of New York, a corporation, as surety, in the sum of Seventeen Thousand (\$17,000) Dollars, as provided by an "Act to Secure the Payment of the Claims of Materialmen, Mechanics, or Laborers, Employed by Contractors upon State, Municipal, or other Public Work," approved March 27th, 1897, and did, on said July 22d, 1910, duly enter into a written contract with the said Metropolis Construction Co., a corporation, by the terms of which said contract said Metropolis Construction Co., a corporation, did contract, undertake and agree to build and construct the said sewer and appurtenances on Fourth and Kentucky Streets according to plans and specifications annexed to said contract and forming part thereof; [40]

AND THAT between said July 22, 1910, and August 6, 1910, the said Metropolis Construction Co., a corporation, as contractors aforesaid, and on or about said dates, and under the aforesaid written contract, and, also, as agents of said owner, did enter into an agreement with said Paul I. Welles wherein and whereby it was agreed that said Paul I. Welles would construct said concrete and pipe sewer and appurtenances, together with all man-holes, "Y" branches, piling and all necessary connections, and wherein and whereby it was agreed that said Paul I. Welles would furnished labor and materials and do all the construction work upon said sewer and appurtenances, and do and perform all the construction work and furnish and supply all materials and labor necessary to fully complete and perform the said contract made



and entered into between the City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co., excepting however, and as between said Paul I. Welles and said Metropolis Construction Co., a corporation, it was agreed that said corporation should furnish to said Paul I. Welles all necessary sand, cement, pipe and rock necessary to be used in the performance of said work, and in the execution of said contract at the actual cost to said Metropolis Construction Co., and should deduct the actual costs thereof from payments agreed to be made by said Metropolis Construction Co. unto said Paul I. Welles in accordance with the terms of the contract entered into between said Welles and said Metropolis Construction Co., an inspection of the original of which contract is hereby tendered to you and said contract is open to your inspection at any time that you may designate. [41]

And in accordance with said agreement so entered into between the Metropolis Construction Co. and said Paul I. Welles the latter commenced on or about the first day of August, 1910, and did proceed with the work of the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets and furnished all the labor and materials used therein, in accordance with the terms of the contract made and entered into by the said City and County of San Francisco, through its Board of Public Works with said Metropolis Construction Co., and said Paul I. Welles has continued to perform said work and to furnish all labor and materials used in said sewer construction.



That said Paul I. Welles has completed 95% or thereabouts of all work contracted to be performed, and has furnished and supplied all labor and materials used, and to be used, in the building and construction of said sewer and appurtenances under and by virtue of the terms of said contract entered into between said City and County of San Francisco, through its Board of Public Works and said Metropolis Construction Co.

THAT under and by virtue of the terms of said agreement so entered into between said Paul I. Welles and Metropolis Construction Co. there has become and now is due, owing and unpaid unto said Paul I. Welles for work performed and materials furnished under said agreement for the building and construction of the aforesaid sewer and appurtenances on Fourth and Kentucky Streets the sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars, accruing as follows: [42]

December 1st, 1910.

Amount paid Metropolis Construction Co.

Contractors.....	\$21,456.79
80% due Paul I. Welles under agreement	
of which sum of \$17,165.32 due him..	17,165.32
Said Paul I. Welles has received only....	9,995.88

Leaving now due said Paul I. Welles of

the said \$17,165.32, so paid contract-

ors.....\$ 7,169.44

Portion of Contract price not yet paid contractors as follows:

Estimated Contract Price.....	\$33,182.00
Less Payments.....	21,456.79
	<hr/>
	\$11,725.21
80% of said \$11,725.21 due Paul I. Welles under said agreement.....	\$ 9,380.16
10% of whole contract price (estimated) to be paid Paul I. Welles under said agreement.....	3,318.20
	<hr/>
	\$19,867.80

That no part of said sum has ever been paid to said Welles. That the whole thereof is now due to said Paul I. Welles from said Metropolis Construction Co. under and by virtue of the terms of said agreement and for work and labor performed and materials furnished in carrying out the contract entered into between Metropolis Construction Co. and said City and County of San Francisco, through its Board of Public Works. [43]

AND YOU AND EACH OF YOU ARE ALSO HEREBY NOTIFIED THAT the amount in value of the labor and materials already done and furnished by said Paul I. Welles in the construction of said sewer and appurtenances is the sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, and that the amount in value of the labor and materials necessary to complete the said construction of said sewer and appurtenances is the sum of One Thousand (1,000) Dollars; a total of Thirty-

Thousand Two Hundred Sixty-one (\$30,261.00) Dollars, and that he, said Paul I. Welles, has received on account thereof the sum of Nine Thousand Nine Hundred Ninety-five and Ninety-eight Hundredths (\$9,995.98) Dollars and no more, and that there remains now due and owing said Paul I. Welles, based on the said amount in value of said labor and materials so done and furnished, the sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, and the whole thereof;

That the work and labor performed and materials furnished by said Paul I. Welles amounting in value of said sum of Twenty-nine Thousand Two Hundred Sixty-one (\$29,261.00) Dollars, has all *be* inspected and accepted by the City Engineer and the same has been approved by the Board of Public Works of the City and County of San Francisco.

WHEREFORE you, the said City and County of San Francisco, and you, the said Mayor thereof, and you, said Board of Supervisors thereof, and you, the said Board of Public Works thereof, and you, said Metropolis Construction Co., a corporation, and you, said Empire State Surety Company, a corporation, are directed and required and hereby GIVEN NOTICE TO RETAIN sufficient moneys out of any moneys due, or that may become due, [44] to said Metropolis Construction Co., a corporation, upon said contract for the construction and building of a sewer and appurtenances in Fourth and Kentucky Streets, in said City and County of San Francisco, dated, to-wit: July 22, 1910, to pay said sum of Seven Thousand One Hundred Sixty-nine and Forty-four



Hundredths (\$7,169.44) Dollars, and,

ALSO said sum of Nine Thousand Three Hundred Eighty and Sixteen Hundredths (\$9,380.16) Dollars, and,

ALSO said sum of Three Thousand Three Hundred Eighteen and Twenty Hundredths (\$3,318.20) Dollars,

AND in all the said sum of Nineteen Thousand Eight Hundred Sixty-seven and Eighty Hundredths (\$19,867.80) Dollars;

AND ALSO that you, and each of you, severally, and, also, jointly, reserve and pay, irrespective of any rights of said Metropolis Construction Company under its said contract dated, to-wit: July 22d, 1910, to said Paul I. Welles, the above mentioned sum of Twenty Thousand Two Hundred Sixty-five and Two Hundredths (\$20,265.02) Dollars, for and on account of the value in amount of labor and materials done and furnished by him in the construction of said sewer and appurtenances.

And you are hereby put upon inquiry as to the nature and extent of the obligation of said Metropolis Construction Co., a corporation, to said Paul I. Welles, upon and for and on account of the work, labor and materials furnished by him in the said construction work hereinabove alleged to have been by him done and completed in and about said sewer and appurtenances; and

ALSO as to the nature and extent and amount in value of the labor and materials done and furnished by said Paul I. Welles [45] in the construction of said sewer and appurtenances and necessary to

complete the same;

And you are further hereby notified that the intent of this notice is to comply with the terms and conditions of Section 1184 of the Code of Civil Procedure in such cases made and provided, and, also, with the provisions of said Act of the Legislature, approved March 27th, 1897, mentioned on page two (2) hereof, and to hold you and each of you, liable to said Paul I. Welles, his heirs, successors and assigns accordingly.

Dated: December 15th, 1910.

PAUL I. WELLES.

C. A. S. FROST,

Counsel for Paul I. Welles,

1304 Humboldt Bank Building,

San Francisco, California.

Telephone—Kearny 4644.

Filed Apr. 18, 1911. [46]

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[Title of Court and Cause.]

**Order to Show Cause.**

On reading the complaint on file herein and upon motion of C. A. S. Frost, Esqr., attorney for complainant, by the Court now here ordered, that John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendant, herein, be, and appear before this Court on Wednesday, May 3d, 1911, at 10 o'clock A. M., then and there to show cause if any they have, why the said Thomas F. Boyle

should not be required to allow and approve the demand, to wit: the Fourth Progressive payment for the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars mentioned in the said bill of complaint, and to deliver the same to said John Daniel, as trustee of the estate of said bankrupt, to abide the result of this action, and also why said Portuguese-American Bank of San Francisco should not be restrained and enjoined from further prosecuting or proceeding with its application for a writ of mandate to said Thomas F. Boyle, now pending in the Superior Court of the State of California, in and for the City and County of San Francisco, and being numbered 33,836 in the records and files of said Superior Court. [47]

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[Title of Court and Cause.]

**Return of United States Marshal on Order to Show Cause.**

United States Marshal's Office,  
Northern District of California.

I hereby certify that on the 19th day of April, 1911, I received from the attorney for the plaintiff in the above-entitled action, three certified copies of an Original Minute Order to Show Cause on file in the Clerk's Office of the United States District Court in and for the Northern District of California, and made by John J. De Haven, Judge of the said United States District Court. Said certified copies having been certified to by the Clerk of the United States District Court in and for said District, and I did



on the 19th day of April, 1911, serve one of said certified copies of Order to Show Cause upon the PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a corporation, by handing to and leaving [48] one of said certified copies of said order with V. L. FIGUEIREDO personally, who is the Cashier of the said Portuguese-American Bank of San Francisco, a corporation, in the City and County of San Francisco, in said District.

I further certify that I served one of said certified copies of said Order to Show Cause upon THOMAS F. BOYLE on the 19th day of April, 1911, by handing to and leaving one of said certified copies of said order with John J. Boyle personally, who is the brother and Chief Deputy in the office of said Thomas F. Boyle, in the City and County of San Francisco, in said District. Said Thomas F. Boyle having informed me over the telephone that he was personally just leaving the City of San Francisco, and that he would accept service of said writ by my serving the same upon John J. Boyle, his Chief Deputy.

I further certify that I served one of said certified copies of Order to Show Cause upon JOHN DANIEL, Trustee of the Estate of Metropolis Construction Company, a corporation, on the 25th day of April, 1911, by handing to and leaving one of said certified copies of said order with said John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, personally, in the City and

County of San Francisco, State and Northern District of California.

C. T. ELLIOTT,  
United States Marshal.  
By B. F. Towle,  
Office Deputy Marshal.

Filed May 1, 1911. [49]

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[Title of Court and Cause.]

**Amendments to Bill of Complaint.**

Now comes the complainant and, by leave of the Court in that behalf first had and obtained, makes and files the following amendments to his bill of complaint on file herein:

**AMENDMENT ONE.**

On page three, line twenty-two (at the beginning of paragraph seven) of said bill, strike out the word "September" and insert in lieu thereof the word "December."

**AMENDMENT TWO.**

On page five, line eleven (near the end of said paragraph seven) of said bill, strike out the words "and its proceeds" and insert in lieu thereof the word "for."

**AMENDMENT THREE.**

On page five, line eighteen (near the end of said paragraph seven) of said bill, strike out the word "fund" and insert in lieu thereof the word "demand." [50]

**AMENDMENT FOUR.**

On page six, line twenty-one (in the first line of

paragraph nine) of said bill, strike out the word "assets" and insert in lieu thereof the word "asserts."

AMENDMENT FIVE.

On page six, line twenty-eight (in the second line of paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

AMENDMENT SIX.

On page seven, line one (near the end of said paragraph ten) of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

AMENDMENT SEVEN.

On page seven, line nineteen (in the second paragraph of the provisions quoted from certain specifications therein mentioned) of said bill, strike out the figures "\$15,000.00" and insert in lieu thereof the figures "\$5,000.00."

AMENDMENT EIGHT.

On page thirteen, line twenty (in the second line of the prayer) after the word "said" insert the words "demand for."

AMENDMENT NINE.

On page thirteen, line twenty-eight, of said bill, strike out the word "moneys" and insert in lieu thereof the word "demand."

Dated: May 24th, 1911.

C. A. S. FROST,

Solicitor for Complainant. [51]

Receipt of a copy of within "Amendments to Bill



of Complaint'' this 24th day of May, 1911, is acknowledged.

M. J. GREEN,

Solicitor for John Daniel, Trustee, Defendant.

JAS. B. FEEHAN,

Solicitor for Portuguese-American Bank of San Francisco, a Corporation, Defendant.

Filed May 24, 1911. [52]

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[Title of Court and Cause.]

**Return of the Portuguese-American Bank of San Francisco.**

The respondent, the Portuguese-American Bank of San Francisco, hereby reserves unto itself the preliminary objection heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the petitioner herein upon the divers grounds set forth in its motion to dismiss said complaint in this matter, and said respondent, the Portuguese-American Bank of San Francisco, does not waive said question of jurisdiction by making this return, but especially challenges the jurisdiction of this Court to make or enter said order prayed for, and without waiving said point of jurisdiction, the said respondent, for the information of this Honorable Court, hereby makes return to the Order to Show Cause herein and sets forth the following specific facts relating to its title to the warrant and demand referred to in said complainant's complaint, that is to say: [53]

On December 6th, 1910, at San Francisco, Califor-

nia, the said corporation, Metropolis Construction Company, did borrow from this respondent, the Portuguese-American Bank of San Francisco, the sum of Thirty Thousand Dollars (\$30,000.00) in gold coin of the United States, and on December 7th, 1910, an additional sum of Five Thousand Dollars (\$5,000.00); that the said Metropolis Construction Company, on said December 6th, 1910, and at the time of obtaining said loan, to secure the payment of said borrowed moneys, assigned to this banking corporation its right, title and interest to three warrants for so many progressive payments in the sum of Thirty-eight Thousand Dollars (\$38,000.00), or thereabouts, upon the City and County of San Francisco, and from said municipal corporation then due and payable, on account of sewer work done and performed by said Metropolis Construction Company under a contract between said Company and the City and County of San Francisco; that written notice of said assignment by said company to this banking corporation, at the time of said assignments to it, was given to and received by the Auditor of said City and County, the official authorized and empowered by law to audit and approve said warrants.

That this banking corporation, for said consideration of said money loaned by it to said Metropolis Construction Company, was and is the holder of said assignment in good faith and for a present fair consideration and the *bona fide* holder thereof, and at the time of said transaction and transfer then did not have any reason to believe, and there was no reason, that the enforcement of such assignment



would effect a preference, and such assignment was not a preference in truth or in fact and is not charged or alleged by said trustee, or any party to this or any other proceeding or suit in this Court, or elsewhere, to be in fact a preference. [54]

That said assignment by said Metropolis Construction Company to this banking corporation was made on December 6th, 1910; that said warrants, one of which is the same warrant in controversy and mentioned in said Complaint of said Paul I. Welles, were duly approved by the Board of Supervisors and the Mayor of said City and County on January 5th, 1911, and presented to said Auditor of said City and County to audit and allow the same;

That in order to enforce its demand to possession of said warrants, this banking corporation, as stated in said complaint, has filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants and surrender the same to this respondent, the Portuguese-American Bank of San Francisco as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the Referee in Bankruptcy in said matter.

That this respondent, the Portuguese-American



Bank of San Francisco, claims and is the legal owner of said warrant and the proceeds thereof, the sole party entitled to have, demand, collect and receive all and singular the moneys represented by said warrant here in controversy, claims and is the owner of the moneys and assets evidenced by said warrant of said City and County by it held as aforesaid by virtue of the assignment to it as herein mentioned adversely against all the world, and asserts its legal right to enforce its said demand against said Auditor to approve [55] said warrants and surrender the same to this banking corporation in its said mandamus proceeding in said State Court and challenges the right of said complainant in this Court, and the power of this Honorable Court to interfere with or arrest its said mandamus proceeding in any manner or form in this forum.

This respondent further states and advises the Court that in said mandamus proceeding in said State Court the title of all adverse claims to said warrants can be fully and speedily heard and determined and said complainant can resist the adverse claims of this banking corporation in said proceeding.

Respondent, the Portuguese-American Bank of San Francisco, further alleges and advises this Honorable Court that said assignment of said warrants was made as aforesaid to this banking corporation on December 6th, 1910, as hereinbefore stated; that the petition to adjudicate said corporation a bankrupt was filed in this Court on December 19th, 1910, and the said adjudication in bankruptcy made on January 5th, 1911.

This respondent further alleges that the said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrant, and bases his refusal to do so upon the ground that there are adverse claimants to said warrant and the moneys represented thereby, to wit, this banking corporation, said Paul I. Welles and the said trustee in bankruptcy herein.

WHEREFORE, having fully set forth the truth and fact relating to said transaction, this respondent prays that said Order to Show Cause be discharged, the said complaint dismissed, and for such other and further order in the premises as may be meet and proper.

JAMES B. FEEHAN,  
Attorney for Respondent.

EDWARD LANDE,  
Of Counsel. [56]

[Duly verified June 19, 1911.]

Filed Jun. 20, 1911. [57]

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[Title of Court and Cause.]

**Amended Return of the Portuguese-American Bank  
of San Francisco.**

Defendant, the Portuguese-American Bank of San Francisco, by leave of court first had, to more fully and completely present its rights herein, hereby makes its Amended Return to the Order made by this Honorable Court on the Bill of Complaint of the complainant herein, requiring this defendant to show cause why Thomas F. Boyle, the Auditor of this City



and County of San Francisco, should not be required to allow and approve the demand therein described, and deliver the same to the Trustee in Bankruptcy, and why this defendant should not be restrained from prosecuting its suit in mandamus against the Auditor of the City and County of San Francisco, now pending in the Superior Court of said City and County, to compel said Auditor to approve and deliver to defendant certain demands mentioned in said petition.

1. This defendant expressly refuses to consent to the jurisdiction of this Court to render any judgment or decree or to [58] make any order in this proceeding affecting the rights of this defendant, and hereby reserves unto itself the objections heretofore urged to the jurisdiction of this Court to make or enter the order prayed by the complainant herein upon the grounds set forth in its motion to dismiss said Bill of Complaint, and makes this Return solely under compulsion of said Order to Show Cause.

2. That the Metropolis Construction Company, the bankrupt, prior to December 5th, 1910, was engaged in constructing certain sewers in San Francisco under contracts with the City and County of San Francisco. That said contracts provided for monthly progress payments, the amount of work done and the progress payments due thereon to be ascertained by the City Engineer and the work done to be approved by the Board of Public Works. During the month of November, 1910, certain work was done under said contracts by said Construction Company, and it was measured by the City Engineer and ap-



proved by the Board of Public Works, and progress payments therefor aggregating about Thirty-eight Thousand Dollars (\$38,000.00) ordered paid by the Board of Public Works of the City and County of San Francisco on the 5th day of December, 1910. That three separate demands upon the Treasury of the City and County of San Francisco for these payments were drawn and were approved by said Board of Public Works, by the City Engineer and by the Finance Committee of the Board of Supervisors of said City and County. That in the ordinary course of procedure these demands would be finally paid by the Treasurer about December 12th, 1910. *These demands include the demand described in the Bill of Complaint of the Complainant herein.*

That said warrants or demands were approved as aforesaid by said Board of Public Works, the said City Engineer and the said Finance Committee, on said December 5th, 1910, and at said date the [59] moneys represented by said demands became due to said Metropolis Construction Company.

3. That thereafter, and on December 6th, 1910, said Metropolis Construction Company applied to the Portuguese-American Bank of San Francisco for a loan of Thirty Thousand Dollars (\$30,000.00), offering, as security therefor, to assign to the said bank the said demands upon the Treasury of said City and County and the proceeds thereof and the moneys represented thereby; that on said December 6th, 1910, pursuant to said application, the said bank loaned to said Metropolis Construction Company the sum of Thirty Thousand Dollars (\$30,000.00), gold coin of

the United States, and at the same time and as part of the same transaction, and for and in consideration of said loan, the said Metropolis Construction Company assigned, transferred and set over absolutely to said bank the said demands and the moneys represented thereby; that said bank thereupon and thereby became and ever since has been, and now is the owner of said demands and the moneys represented thereby and entitled to the exclusive possession thereof; that thereafter, and on the 7th day of December, 1910, said bank, at the request of the said Metropolis Construction Company, and on the strength and security of said assignment, advanced and loaned to said Metropolis Construction Company the further sum of Five Thousand Dollars (\$5,000.00), gold coin of the United States, making in all advances or loans of Thirty-five Thousand Dollars (\$35,000.00). That said loans draw interest at the rate of seven per cent (7%) per annum. That no part of said loans or either of them has been repaid.

That said assignment was made to said Portuguese-American Bank of San Francisco by said Metropolis Construction Company, prior to the filing of the petition in bankruptcy herein and prior to the commencement of any proceedings in any court against said Construction [60] Company affecting its credit or solvency and while said Construction Company was a solvent, going concern, engaged in business on a large scale in said City and County and the holder of valuable contracts with said City and County.

That said money was loaned by the said bank and



said assignment accepted in good faith, in the ordinary course of business and without notice to or knowledge on the part of the said bank, or any of its officers, at any time, that said Metropolis Construction Company was insolvent, or in any way involved, or that its credit was impaired, or that insolvency or receivership proceedings were contemplated by or against it; that at the time of said assignment this bank did not, nor did any of its officials, have any reason to believe, and there was no reason, that the enforcement of said assignment would effect a preference, and such assignment is not a preference in truth or in fact; but, on the contrary, said bank, at the time said assignment was made, and at all times prior thereto, considered said Metropolis Construction Company financially sound and successful and amply able to meet all its obligations; that at all said times said Metropolis Construction Company enjoyed a large credit.

4. That this defendant, at all times subsequent to said assignment, to wit: December 6th, 1910, and prior to the filing of the petition in bankruptcy herein, claimed and was, and it now claims to be and is the owner and holder of the legal title of said warrants, and the proceeds thereof and the moneys represented thereby and the sole party entitled to have, demand, collect and receive, all and singular the moneys represented by said warrants herein in controversy.

5. *That none of said demands upon the Treasury was ever in the possession of said bankrupt, either by itself, its agent or [61] agents, or any person*



representing it, at any time subsequent to the said assignment to this bank. *That said demands were never in the possession of the Trustee in Bankruptcy, or under the control of the Bankruptcy Court*, but, on the contrary, said warrants were always, subsequent to December 5th, 1910, and are now in the possession of the officials of the City and County of San Francisco. That none of the moneys represented by said demands has ever been withdrawn from the Treasury of the City and County of San Francisco.

6. That this defendant, in order to enforce its demand to possession of said warrants, as stated in said Bill of Complaint, on January 26th, 1911, and *before the appointment of the Trustee* herein, filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and there is now pending in said Superior Court the verified petition of this banking corporation praying for the judgment and decree of said court that a Writ of Mandate issue to said Auditor requiring and commanding him to audit and approve said warrants, including the demand herein sued for, and surrender the same to this defendant, as the sole party legally entitled thereto and the legal holder thereof. That said petition is pending and undetermined, and further proceedings therein have been restrained by the preliminary restraining order issued by the *Referee in Bankruptcy* in said matter.

That none of the parties to said mandamus proceeding are parties to the proceeding in bankruptcy.

That defendant is informed and believes, and therefore alleges that said Superior Court, in said man-

damus proceeding, has full jurisdiction to determine the rights and claims of the said complainant and the trustee, and all persons whatever to the possession of said warrants and the moneys represented thereby. [62]

This respondent further alleges that said Auditor of said City and County absolutely refuses to audit, surrender, or audit or surrender said warrants, and bases his refusal upon the ground that there are adverse claimants to said warrants and the moneys represented thereby.

7. That said Auditor must determine who is legally entitled to the possession of said demand and is responsible personally and on his bond for the delivery thereof to the property party; that this defendant claims to be the owner and entitled to the possession thereof; that title and right of possession can be determined only by a judgment on the merits and not at this stage of the proceeding; that said Auditor and this defendant object, and each objects, that this Honorable Court is without jurisdiction to enter into a trial on the merits, and neither consents to being made a party defendant herein. That this Honorable Court on the facts set forth in this Amended Return should not make any order at this time which might prejudice the legal rights of said Auditor or this defendant by changing the status and actual possession of the property in controversy.

That the mandamus suit now pending in the Superior Court, and which it is herein sought to be restrained, is brought to enforce the approval, audit and delivery of *two other demands* besides the one in

controversy, and for this reason, as well as others, this Court should not enjoin the prosecution of said suit.

That an assignment for security transfers the legal title.

Gilman vs. Curtis, 66 Cal. 116.

That the Superior Court can try title in mandamus, see

Bannerman vs. Boyle, decided by California Supreme Court in bank June 8th, 1911, and reported in The Recorder on June 10, 1911, also reported in Cal. Decisions issue of June 16, 1911, Vol. 41, page 703.

McKannay vs. Horton, 151 Cal. 711. [63]

WHEREFORE, this defendant prays that this Honorable Court make no order in this summary proceeding requiring said Auditor to audit, allow or approve said demands, or deliver the same to the bankrupt, or said trustee, or restraining this defendant from prosecuting said action in said Superior Court; that said Order to Show Cause be discharged, and for such other and further orders as may be meet and proper in the premises.

JAMES B. FEEHAN,  
Attorney for Respondent.

EDWARD LANDE,  
Of Counsel. [64]

[Duly verified June 27, 1911.]

Filed Jun. 27, 1911. [65]



[Title of Court and Cause.]

**Exceptions to Amended Return of Portuguese-American Bank of San Francisco.**

The complainant objects and excepts to the amended return of the Portuguese-American Bank of San Francisco, alleged to be its amended return to the order to show cause herein, and avers that said amended return is insufficient in the following particulars, to wit:

I.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner it is claimed that said Metropolis Construction Company assigned or transferred or set over said demand or warrant in controversy, or moneys represented thereby, to said banking corporation.

II.

Said amended return is insufficient in that it does [66] not appear and cannot be ascertained therefrom how or in what manner, it is claimed said bank is the legal owner of said warrant, or the proceeds thereof, or whether or not said bank is the owner of said warrant, or proceeds, at all.

III.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom whether it is claimed said alleged assignment or transfer was verbal or in writing or in what said alleged assignment consists.

IV.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom what basis, if any, exists for the alleged claim of said Portuguese-American Bank of San Francisco to be the owner of said warrant or to have an assignment thereof.

V.

That said amended return is insufficient in that it does not appear and cannot be ascertained therefrom how or in what manner said bank claims adversely, in that the alleged facts constituting said claim are not disclosed.

VI.

That said amended return is insufficient in that it does not show any *facts* which, if true, constitute a reasonable ground of controversy as to the legal title to said demand; the statement of said bank that it has an "assignment" of, or is the "owner" of said demand, being merely a conclusion of law, unsupported by any *alleged* facts.

C. A. S. FROST,

Solicitor for Complainant.

June 30, 1911. [67]

Receipt of a copy of within *Exceptions* this 3d day of July, 1911, is admitted.

JAS. B. FEEHAN,

Attorney for Defendant Portuguese-American Bank  
of San Francisco.

Filed Jul. 3, 1911. [68]

[Title of Court and Cause.]

**Amended Return to Order to Show Cause, and  
Answer of Thomas F. Boyle, Defendant.**

Now comes Thomas F. Boyle, as one of the defendants in the above-entitled action, and by leave of Court first had and obtained, makes and files the following amended return to the order to show cause, issued herein, and makes and files the following also as his answer to the bill of complaint herein:

I.

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, XI, XIa, XV, XVI, XVII, and XX, of said bill of complaint.

II.

Admits each and every allegation set forth in paragraph VII of said bill of complaint, except the allegations set forth on lines 20, 21, and 22, page 4 of said bill, in said paragraph VII, and the allegations set forth on lines 17, 18 and 19, page 5 of said bill, in said paragraph VII, and each and every of said allegations are denied. [69]

III.

Denies that allegation set forth in paragraph IX of said complaint, that only the complainant, defendant trustee, and the defendant Portuguese-American Bank assert claims to said demand, and in this regard alleges that certain claims, rights, offsets, or counterclaims are made to the demands of money therein referred to, by Empire State Surety Company, a corporation, Central Trust Company, of California, and Pacific Coast Casualty Com-



pany, who have filed notices of such claims in the office of this defendant as Auditor of the City and County of San Francisco, true copies of which notices are attached hereto and made a part hereof, and are marked respectively Exhibit "A," Exhibit "B," Exhibit "C." The notices of claim of said Portuguese-American Bank are attached hereto and made a part hereof, and marked Exhibits "E" and "F."

IV.

That defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs XII, XIV and XVIII of said bill of complaint, and therefore he denies each and every of said allegations.

V.

Admits that the work of construction of said sewers and appurtenances at Fourth and Kentucky streets, in said City and County of San Francisco, has been approved and accepted by said City and County.

VI.

Admits that on or about the 13th day of April, 1911, acting under authority of a document filed in his office, a true copy of which, marked Exhibit "D," is attached hereto, and made a part hereof, defendant approved and delivered to John Daniel, Trustee in [70] Bankruptcy a warrant or demand in the sum of Eleven Thousand One Hundred Forty-nine and Sixty-four One Hundredths (\$11,149.64) Dollars, in favor of the Metropolis Construction Company, being for the final payment on the Fourth and

Kentucky streets sewer contract, but alleges that this defendant has no knowledge, information or belief sufficient to enable him to answer any or either of the allegations contained in paragraphs VIII and XIX of said bill of complaint as to the disposition made by said Trustee of said warrant or demand, and the payment by said Trustee of any moneys obtained by him by virtue of said warrant, and therefore he denies each and every of said allegations.

#### VII.

Admits each and every allegation contained in paragraph XXI of said bill of complaint except the allegation set forth on lines 15 and 16, page 13 of said bill, which allegation is denied and in that regard, it is alleged that said State Court has jurisdiction to hear and determine conflicting claims to said funds.

#### VIII.

Defendant alleges that he has not, nor has he had at any time, in his possession or under his control, any moneys claimed by any of the parties to this action, but admits that he has in his possession, awaiting his official approval as Auditor of said City and County of San Francisco, a warrant or demand in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, payable to the Metropolis Construction Company, as the fourth progress payment on the contract for the construction of the Fourth and Kentucky street sewer, and that he has not approved said warrant or demand, because of the conflicting claims to the [71] right of possession of said warrant, as is more

fully set forth herein, and in the bill of complaint, and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stake holder.

IX.

Defendant further alleges that the alternative writ of mandate and order to show cause why he should not deliver possession of the demand to the Portuguese-American Bank of San Francisco, issued by the Superior Court of the State of California, in and for the City and County of San Francisco, as is more fully set forth in paragraph XXI of the bill of complaint, is yet in full *and* force and effect, and that defendant is now subject to said order of said Superior Court, and is awaiting adjudication by said court of the conflicting claims to the right of possession of said demand, so that he may know to whom said demand shall be delivered by him.

WHEREFORE, defendant prays that he may be hence dismissed.

THOS. F. BOYLE,  
Defendant.

EDWARD F. MORAN,  
Attorney for Defendant Thomas F. Boyle. [72]  
[Duly verified June 30, 1911.] [73]



**Exhibit "A" [to Amended Return and Answer of  
Thomas F. Boyle—Notice Dated December 15,  
1910].**

San Francisco, Calif., Dec. 15, 1910.

NOTICE to the  
BOARD OF PUBLIC WORKS, City and County  
of San Francisco, State of California,  
BOARD OF SUPERVISORS, City and County of  
San Francisco, State of California,  
CITY AND COUNTY OF SAN FRANCISCO,  
STATE OF CALIFORNIA, a Municipal Cor-  
poration,  
METROPOLIS CONSTRUCTION COMPANY, a  
Corporation,  
PAUL I. WELLES.

You and each of you will please hereby take notice that on the 21st day of July, 1910, in the City and County of San Francisco, State of California, the METROPOLIS CONSTRUCTION COMPANY, a corporation, did, by and through its officers thereunto duly authorized, make application to the undersigned THE EMPIRE STATE SURETY COMPANY, for contractors bonds in the sum of Seven Thousand and 00/100 (\$7000.00) Dollars, and Seventeen Thousand and 00/100 (\$17,000.00) Dollars, respectively conditioned for the performance of the contract for the construction of Sewer System along and upon Fourth and Kentucky Streets, City and County of San Francisco, State of California.

You are further notified that subsequent to the making of such application said bonds were in due

form regularly and legally issued and delivered, and that the said METROPOLIS CONSTRUCTION COMPANY, thereafter commenced and has since prosecuted the work under said contract.

That the performance of the work has now ceased and that under and by virtue of the agreement between the Metropolis Construction [74] Company, a corporation as aforesaid, and THE EMPIRE STATE SURETY COMPANY it is provided that in the event of the METROPOLIS CONSTRUCTION COMPANY defaulting in the performance of the said contract, the said THE EMPIRE STATE SURETY COMPANY, shall have the right to collect and reserve all reserve percentages and all moneys due and to become due said Principals under said contract, and to hold and apply the same as collateral to the obligations of said METROPOLIS CONSTRUCTION COMPANY, said agreement being dated July 21st, 1910.

You are therefore hereby notified that all moneys in your hands must be held under the terms of said agreement for the use and purposes therein provided and that you will not pay out the same or any part thereof, excepting in accordance with the terms of said agreement.

Dated this 15th day of December, 1910, at San Francisco, California.

[Seal] THE EMPIRE STATE SURETY COMPANY,

By JAS. C. HAYBURN,  
Attorney in Fact and General Agent. [75]



**Exhibit "B" [to Amended Return and Answer of  
Thomas F. Boyle—Letter Dated December 13,  
1910—Gavin McNab to Thomas F. Boyle].**

COPY.

December 13th, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Fran-  
cisco,

City Hall,

McAllister St., City.

Dear Sir:—

You are hereby notified that Central Trust Company of California, a corporation having its offices at the corner of Sansome and Market Streets, San Francisco, claim to have, and has a valid claim and demand against and interest in any moneys which are now due and payable, or which may become due and payable to Metropolis Construction Company, for services rendered and materials furnished to the City and County of San Francisco (or any department thereof), and you are hereby requested to disallow and disapprove any claim or demand against the City and County of San Francisco or any department thereof, presented to you to be audited by Metropolis Construction Company or any assignee of Metropolis Construction Company, unless the Central Trust Company hereafter consents to such approval of such claim or demand.

The Metropolis Construction Company, a corporation, is now indebted to the Central Trust Company of California, in the sum of \$60,000.00, which sum is evidenced by the promissory notes of Metropolis Construction Company, for moneys loaned and advanced by Central Trust Company of California to Metro-



polis Construction Company, to enable it to purchase materials, and to perform labor in carrying out its contracts with the City and County of San Francisco, and that by reason of the furnishing and advancing said moneys to Metropolis Construction Company said Central Trust Company of California has a valid claim and demand and interest in [76] any moneys now payable to Metropolis Construction Company.

Yours truly,

GAVIN McNAB,

Attorney for Central Trust Company. [77]

**Exhibit "C" [to Amended Return and Answer of Thomas F. Boyle—Notice Dated February 3, 1911].**

COPY.

THE MARSHALL A. FRANK COMPANY.

San Francisco, Cal., February 3, 1911.

To the City and County of San Francisco, the Honorable Board of Supervisors of Said City and County, the Board of Public Works, and to Honorable Thomas F. Boyle, Auditor:

Dear Sirs:—

You and each of you are hereby notified that the PACIFIC COAST CASUALTY COMPANY, a corporation, heretofore gave a bond conditioned on the faithful performance by the METROPOLIS CONSTRUCTION COMPANY, of that certain contract known as contract number 36, for the construction of sewers and appurtenances in the Lower Sunset District in the City and County of San Francisco.

Pursuant to notice from the Board of Public Works of the City and County of San Francisco, and

under authority of the United States District Court, for the Northern District of California, sitting in bankruptcy, the PACIFIC COAST CASUALTY COMPANY has undertaken to complete the said contract.

You are hereby further notified not to pay to anyone on behalf of the METROPOLIS CONSTRUCTION COMPANY, or to anyone other than the undersigned, any moneys due or earned, or that may become due under said contract.

You are particularly notified not to make any payment to the Portuguese American Bank of San Francisco under notice by it of purported assignment to said Bank of alleged rights to certain of said moneys, or to the United Railroads under notice of purported [78] assignment to it of alleged rights of certain of said monies, and are notified not to make, execute, audit or deliver, warrant or demand to any person or corporation whatsoever, other than to the undersigned.

THE UNDERSIGNED, PACIFIC COAST CASUALTY COMPANY, hereby claims as surety as aforesaid, that it is entitled to have all of said monies applied to the completion of said work, and for any diversion of said monies, or any thereof, or any appropriation of said monies to the use or benefit of another, the said PACIFIC COAST CASUALTY COMPANY will be obliged to hold you respectfully responsible.

Very respectfully,

(Signed) PACIFIC COAST CASUALTY CO.

MARSHALL A. FRANK,

Attorney-in-fact. [79]

**Exhibit "D" [to Amended Return and Answer of  
Thomas F. Boyle—Letter Dated March 15, 1911,  
to T. F. Boyle].**

March 15, 1911.

Thomas F. Boyle, Esq.,  
Auditor of City and County of San Francisco,  
San Francisco, Cal.

Dear Sir:

You are authorized to deliver the warrant for the final payment (\$11,149.64) on the contract to the Metropolis Construction Co., a corporation, with the City and County of San Francisco, for the construction of sewers and appurtenances at Fourth and Kentucky Streets in said City and County to John Daniel, Trustee in bankruptcy, it being understood that said Trustee will take the same subject to notice to withhold for the amounts, and filed on the dates, respectively, set opposite our names below:

Name.	Amount.	Date.
Moriarity & Perkins, by C. A. S.		
Frost, Counsel.	\$820.26	December 12, 1910.
Santa Cruz Portland Cement		
Co., by L. F. Young Leahy.	2519.00	Feb. 18, 1911.
Paul I. Welles.	19867.80	Dec. 16, 1911.
Bay Development Co.	493.95	Jan. 4, 1911.
Vallejo Brick & Tile Co., Con., by		
C. Hidecker, Gen. Manager.	609.51	Feb. 21, 1911.
San Francisco Gas & Electric		
Co., by J. M. Shields, OK. L.		
H. S.	226.75	Feb. 4, 1911.
Loop Lumber Co., by R. T.		
Hardy.	121.96	Feb. 4, 1911.
Mutual Teaming Co.	676.00	Dec. 20, 1911.



**Exhibit "E" [to Amended Return and Answer of  
Thomas F. Boyle—Notice Dated December 17,  
1910].**

COPY.

**PORTUGUESE-AMERICAN BANK.**

San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works  
and to the Board of Supervisors of the City and  
County of San Francisco.

Gentlemen:—

You are hereby notified that the Metropolis Construction Company has assigned, for value, to the Portuguese-American Bank of San Francisco the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85 being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Construction Co. and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the Metropolis Construction Co. and said

City and County and dated June 22nd, 1910, and being for construction of sewer in 7th [81] Street, Howard to Hubbell Streets under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions to the Board of Public Works authorizing said fourth progressive payments.

Yours very truly.

(Signed) PORTUGUESE-AMERICAN BANK  
OF S. F.

By JAS. B. FEEHAN,  
Atty. [82]

**Exhibit "F" [to Amended Return and Answer of  
Thomas F. Boyle—Notice Dated December 5,  
1910].**

**COPY.**

San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of  
San Francisco.

Dear Sir:—

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth

Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910 for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th street, Howard to Hubbell Streets under contract No. 31.

(Signed)      METROPOLIS CONSTRUCTION  
COMPANY, INC.,

By \_\_\_\_\_,

President. [83]

Due service and receipt of a copy of the within return to the order to show cause and answer is hereby admitted this 30th day of June, 1911.

C. A. S. FROST,

Attorney for Complainant.

Filed Jul. 3, 1911. [84]

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[Replication to Answer of Thomas F. Boyle.]

[Title of Court and Cause.]

REPLICATION OF PAUL I. WELLES, COM-  
PLAINANT, TO THE ANSWER OF  
THOMAS F. BOYLE, DEFENDANT.

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of



exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Thomas F. Boyle, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed. [85]

July 8th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of within Replication this 8th day of July, 1911, is admitted.

E. F. MORAN,

Attorney for Defendant Thos. F. Boyle.

Filed Jul. 10, 1911. [86]

**[Order Referring Case to Referee to Hear Testimony and Find Facts, etc., and Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]**

[Title of Court and Cause.]

ORDERED that this case be referred to A. B. Kreft, Referee, to hear the testimony and find the facts upon all the issues made by the pleadings, and report the same to this Court, and that in the meantime, and until the further order of this Court the defendant Portuguese-American Bank of San Francisco, be restrained from prosecuting the mandamus proceeding mentioned and referred to in the bill of complaint filed herein.

Dated: July 11th, 1911.

JOHN J. DE HAVEN,  
Judge.

Filed Jul. 11, 1911. [87]

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**[Order Restraining Portuguese-American Bank from Prosecuting Mandamus Proceedings.]**

[Title of Court and Cause.]

This case having been heretofore submitted to the Court on an order to show cause and returns thereto, now after due consideration had thereon, the Court made and filed its order referring the case to A. B. Kreft, Referee in Bankruptcy, to hear the testimony and find facts on all issues made by the pleadings and report, and in the meantime and until the further order of the Court the defendant Portuguese-Ameri-

can Bank of San Francisco is restrained from prosecuting the mandamus proceedings mentioned and referred to in the bill of complaint filed herein. [88]

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**[Answer of John Daniel, Trustee, etc.]**

[Title of Court and Cause.]

**ANSWER OF JOHN DANIEL, TRUSTEE OF  
THE ESTATE OF METROPOLIS CON-  
STRUCTION COMPANY, A CORPORA-  
TION, BANKRUPT, DEFENDANT.**

Now comes John Daniel, Trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and for answer to Bill of Complaint, as amended, admits, denies and alleges as follows:

**I.**

Admits each and every allegation set forth in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIa, XII, XIII, XV, XVI, XVII, XIX, XX, and XXI of said Bill of Complaint as amended.

**II.**

Denies the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended, except that defendant [89] Daniel admits that there has been an accounting between complainant and defendant Daniel had in this court in the matter of the estate of said bankrupt before the Referee herein, which said accounting cannot be fully and finally completed, and the various amounts due adjusted, unless and until the respective claims of the complainant and the defendant, Portuguese-Ameri-



can Bank of San Francisco, a corporation, to the Fourth Progress payment due the bankrupt on its contract with the City and County of San Francisco for the construction of sewers and appurtenances in Fourth and Kentucky Streets shall have been heard and determined; and in that behalf, defendant Daniel requires proof of the allegations of paragraphs XIV and XVIII of said Bill of Complaint as amended.

### III.

And defendant Daniel alleges, that on the 21st day of December, 1910, he, together with A. B. Tognazzi and Edmund F. Greene, were, by order of this Court duly given and made, appointed receivers of the estate of property of Metropolis Construction Company, a corporation, bankrupt herein; that said Receivers on said day duly qualified and immediately took possession among other things of the contract of said bankrupt with the City and County of San Francisco and proceeded to complete, and thereafter continued work upon (through Paul I. Welles, Complainant, sub-contractor), and completed, said contract; that thereafter, and on the 1st day of February, 1911, said Receivers resigned and delivered possession of all of the property of said bankrupt (including said bankrupt's rights under said Fourth and Kentucky Streets contract) to defendant Daniel, who, on said February 1st, was [90] appointed and qualified as Trustee of said bankrupt's estate, in accordance with an order of this Court herein duly given and made.

WHEREFORE, defendant Daniel joins the com-

plainant in his prayer for an accounting, and prays that said warrant be delivered up to him and the proceeds thereof ordered distributed, either to the general creditors of said bankrupt, or to secured creditors, as may be according to justice and equity.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorney for Defendant Daniel. [91]

[Duly verified February 5, 1911.]

Filed Sep. 5, 1911. [92]

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[Answer of Portuguese-American Bank of San  
Francisco.]

[Title of Court and Cause.]

THE ANSWER OF THE PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, A CORPORATION, ONE OF THE ABOVE-NAMED DEFENDANTS, TO THE AMENDED BILL OF COMPLAINANT, PAUL I. WELLES.

Now comes said Portuguese-American Bank of San Francisco, a corporation, one of the defendants herein, not waiving but insisting upon its objections to the jurisdiction of this Court, and not consenting to its jurisdiction but expressly declining to consent to such jurisdiction, and not waiving the benefit of its demurrer to the jurisdiction of this Court heretofore interposed to said amended bill of complaint; and saving and reserving to itself now, and at all times hereafter, all and all manner of benefit and



advantage of exception which can or may be had or taken to the said amended bill of complaint, for answer thereto says:

I.

This defendant admits that the allegations of paragraphs I, II, III, IV, V and VI, of said amended bill of complaint are true. [93]

II.

This defendant admits that the allegations of paragraph VII, of said amended bill of complaint, down to and including the word "County," on line 19, page 4, are true; denies that the demand therein mentioned has been allowed by every officer, board, department and committee required by law to act thereon, and in this behalf avers that said demand has not been allowed by the Auditor of the City and County of San Francisco, and that said Auditor is an officer required by law to act thereon; admits that said demand was presented to said Auditor, Thomas F. Boyle, on or about January 6, 1911, for approval or allowance; admits that said demand is now in the hands of said Auditor; admits that prior to the commencement of this action defendant Trustee demanded of defendant Boyle that he approve and allow said demand and deliver it to said Trustee, and that said Boyle has failed and refused to so deliver said demand, and still fails and refuses to do so; denies that said defendant Boyle has not any good or sufficient reason for so failing and refusing to deliver said demand to said Trustee, and in this behalf avers that this defendant was at all said times, and is now, the owner of said demand by



assignment thereof for a present valuable consideration from the Metropolis Construction Company, a corporation, and was at the time of said demand upon said Boyle by said Trustee, and ever since has been, and is now, the owner of and entitled to the possession thereof; and that notice of defendant's claim to said demand was served on said Auditor prior to said demand by said Trustee; denies that said Auditor Boyle individually or as Auditor of said City and County of San Francisco, has not, or does not assert any claim to said demand or to the sum of \$6,830.85, or any part thereof, or any offset or counterclaim thereto, and in this [94] behalf avers that said Boyle individually and as Auditor does assert a claim to said demand; this defendant has not sufficient information on which to form a belief as to whether said City and County of San Francisco, or any officer, agent or department thereof, asserts or has any claim to said demand or money, or offset or counterclaim thereto, and for that reason denies that said City and County, or any officer, agent or department thereof, does not assert or has not a claim to said demand or money, or offset or counterclaim thereto, or to either; denies that the sole or only or any reason why said Boyle does not immediately deliver said demand for \$6,830.85 to said Trustee, is that there exists some doubt in the mind of said Boyle as to whether said Trustee, or complainant, or this defendant is rightfully entitled thereto, but on the contrary this defendant avers the reason is that defendant Boyle holds said demand for the person legally entitled thereto, and refuses

to deliver it to said Trustee in order to protect himself from liability in damages; denies that said Trustee is legally entitled, or entitled, to the possession of said demand.

### III.

Answering paragraph IX of said amended bill of complaint, defendant is informed and believes, and therefore alleges that the United Railroads of San Francisco, a corporation, asserts a claim and right in and to the demand of \$6,830.85, mentioned in paragraph VII, and for that reason denies that no person, firm or corporation asserts any claim, right, offset or counterclaim whatever to said demands or moneys or any part thereof, save only complainant, said defendant Trustee and this defendant.

### IV.

Admits that this defendant claims a right to said demand for [95] \$6,830.85, by virtue of an assignment thereof from the Metropolis Construction Company, bankrupt; denies that this defendant has no assignment thereof, or has no right to said moneys or any part thereof, and in this behalf avers that on December 6, 1910, this defendant loaned to said Metropolis Construction Company thirty thousand dollars in gold coin of the United States, and at the same time, for and in consideration thereof, and as part of the same transaction said Metropolis Construction Company assigned, set over and transferred absolutely to this defendant, the said demand and the moneys represented thereby; that ever since said December 6, 1910, this defendant has been and is the owner of said demand and moneys represented



thereby, and is entitled to the exclusive possession thereof.

V.

Admits that the statements of paragraph XI of said amended bill of complaint, are true.

VI.

Denies that the Board of Public Works never gave consent to any assignment to defendant Bank, as alleged in Paragraph XI-a.

VII.

This defendant denies, upon information and belief, that on July 30, 1910, or at any time, the Metropolis Construction Company made or entered into the agreement with complainant, mentioned in Paragraph XII of said amended bill of complaint.

VIII.

Admits that complainant has completed the construction of sewers and appurtenances in Fourth and Kentucky Streets, but denies on information and belief that said work was done under the agreement set forth in Paragraph XII, or in compliance with its terms or conditions; admits that said work was done in compliance with the [96] terms and conditions of the agreement between the Metropolis Construction Company and the City and County of San Francisco, for the construction of said sewers and appurtenances; admits that said work has been approved and accepted by said City and County.

IX.

Denies, on information and belief, that there remains due or owing to Paul I. Welles from the Metropolis Construction Company the sum of \$19,-



844.65, or any sum, under or by virtue of the contract mentioned in Paragraph XII between said Welles and said company, or that there are any set-offs or counterclaims in favor of said bankrupt against said Welles on said contract with said bankrupt; or that any offset is subject to deductions on behalf of said Welles by virtue of said contract with said bankrupt, or that there is now due or owing to said Welles from said bankrupt any sum of money whatever by virtue of or under said contract between said Welles and said bankrupt.

X.

Admits the allegations of paragraphs XV and XVI and XVII of said amended bill of complaint, to be true.

XI.

Denies on information and belief that there is any money available on the contract between complainant and said Metropolis Construction Company, mentioned in Paragraph XII of said amended bill of complaint; denies that any money is in the possession of defendant Boyle; denies that complainant has any claim against said bankrupt by virtue of said contract; denies that complainant is entitled by virtue of prior right, or any right, to the sum of \$6,830.85, or to the demand representing that sum; denies on information and belief that said Trustee denies said complainant's [97] claim in part, or at all; denies that said Trustee asserts that he is entitled thereto for the general creditors of the bankrupt.

XII.

Denies that out of the \$11,149.64 received by the

Trustee, as alleged in paragraph XIX of said amended bill of complaint, or at all, all claims against said fund have been paid or discharged, save only the claim of this defendant; defendant in this behalf alleges that the claim of the United Railroads of San Francisco, a corporation, against said demand and said sum of \$6,830.85, has not been paid or discharged, or released by said corporation.

XIII.

Admits that the allegations of paragraph XX of said amended bill of complaint are true.

XIV.

Admits that the allegations of paragraph XXI of said amended bill of complaint, down to and including the word "commanded," line 13, page 13, are true; denies that said application for a writ of mandate is a summary proceeding; denies that said State Court has no jurisdiction therein to hear and determine conflicting claims to said funds; admits that neither complainant nor defendant Trustee is a party to said mandamus proceeding; in this behalf defendant alleges that said alternative writ of mandate, together with summons and a copy of the complaint in said action, were served upon said Boyle prior to the commencement of this action.

XV.

Further answering said amended bill of complaint, this defendant alleges:

That it is, and was at all the times mentioned in said amended bill, a banking corporation duly organized and existing [98] under the laws of the State of California, and has and at all said times had



its principal place of business in San Francisco, California.

That for more than two years prior to the bankruptcy of the Metropolis Construction Company, a corporation, as set forth in said amended bill of complaint, said Metropolis Construction Company banked with this defendant, and obtained loans from this defendant to enable it to carry on its contracts, in the ordinary course of business.

That after the approval of the demand for the fourth progressive payment under the contract mentioned in paragraph VI of said amended bill of complaint, by the Board of Public Works of the City and County of San Francisco, on December 5th, 1910, as fully set forth in paragraph VII of said amended bill of complaint to which reference is hereby made, the said Metropolis Construction Company, on the 6th day of December, 1910, borrowed and received from this defendant the sum of thirty thousand dollars in gold coin of the United States, and at the same time, and as part of the same transaction, and as security for said loan of thirty thousand dollars, said Metropolis Construction Company, assigned, transferred and set over absolutely to this defendant the said demand for said fourth progressive payment and the money represented thereby, to wit: \$6,830.85, together with two other demands and moneys represented thereby, the three demands aggregating about \$38,000.00. That this defendant has ever since been, and now is, the owner of said demand, and said money represented thereby, and was at the time of the commencement of this action, ever since has been and now is entitled to the possession



of said demand and to receive the money upon it.

That this defendant has at all times subsequent to said 6th [99] day of December, 1910, claimed and claims said demand as the absolute owner thereof, and claimed and claims to be the sole party entitled to receive the money thereon.

That on December 7, 1910, this defendant made a further loan of \$5,000.00 to said Metropolis Construction Company, upon the said assignment.

That said loans bear interest at 7% per annum from date thereof, and that no part of said loans has been repaid, nor any of the interest accrued thereon; that there is due to this defendant on account of principal and interest on said loans the sum of \$35,000 gold coin of the United States, and interest accrued and to accrue at 7% per annum on \$30,000 from December 6, 1910, and of \$5,000 from December 7, 1910, in like gold coin.

That on the 22d day of July, 1910, and continuously ever since, the Charter of the City and County of San Francisco, contained the following provisions: MATTERS UNDER CONTROL OF THE BOARD.

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

#### DRAINAGE.

2. Of all sewers, drains and cesspools, and of the work pertaining thereto or to the drainage of the City and County.

#### CONDUITS; GARBAGE AND SEWAGE; SEWERAGE and DRAINAGE SYSTEM.

7. Of any and all wires and conduits, the collec-

tion and disposal of street refuse, garbage and sewage, and the designing, construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9—Art. VI—Chap. I. [100]

#### ACCEPTANCE OF WORK.

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works;

. . .

When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec. 22—Art. VI—Chap. I.

That after the said assignment to this defendant, said demand for said fourth progressive payment under the contract mentioned in paragraph VI of said amended bill, has never been in the possession of said Metropolis Construction Company, or of the said Trustee in Bankruptcy, or of the Bankruptcy Court.

That this defendant has never appeared in said Bankruptcy proceedings affecting said Metropolis Construction Company, mentioned in paragraph IV of said amended bill of complaint.

That when the said assignment was made, and the money loaned thereon, as aforesaid, no proceedings were pending against said Metropolis Construction Company affecting or involving its credit or solvency; that said loans were made in the ordinary course of business, and said assignment accepted as

security therefor in good faith by this defendant, and without notice or knowledge on its part, or on the part of any of its officers, that said Metropolis Construction Company was insolvent, or that its credit was in any way involved or impaired, or that insolvency or receivership proceedings were to be taken against it, or that said assignment would be a preference. [101]

That said assignment vested this defendant with the legal title to said demand for \$6,930.85, under the laws of the State of California, and that this defendant has ever since claimed, and still claims, said demand and the money represented thereby, adversely to said complainant, and to said defendant Trustee, and to said defendant Boyle.

WHEREFORE, this defendant prays that it be hence dismissed with its reasonable costs in this behalf sustained.

PORTUGUESE-AMERICAN BANK OF  
SAN FRANCISCO,

[Seal]

By J. A. SILVEIRA,

Vice-President.

JAMES B. FEEHAN,

Solicitor.

EDWARD LANDE,

Of Counsel. [102]

[Duly verified October 6, 1911.]

Received a copy of within answer October 6, 1911.

C. A. S. FROST,

Solicitor for Paul I. Welles.

Filed Oct. 6, 1911. [103]



[Title of Court and Cause.]

**Report of Referee [Filed October 14, 1911].**

To the Honorable the Judges of the *District of* the United States in and for the Northern District of California.

The undersigned, Referee in Bankruptcy, to whom, on the 11th day of July, 1911, the above-entitled cause was referred "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to this Court," respectively reports as follows:

Said matter was brought on for hearing on the 8th day of August, 1911, and was continued from time to time until the 5th day of September, 1911, when the matter was submitted. The testimony and proceedings were taken in shorthand by Brainard C. Brown, and a transcript thereof is herewith submitted. I was attended upon said hearing by C. A. S. Frost, Esq., attorney for complainant, Milton J. Green, Esq., attorney for trustee, and James B. Feehan, Esq., and J. P. Allen, Esq., attorneys for Portuguese-American Bank. E. F. Moran, Esq., attended as attorney for Thomas F. Boyle.

John Daniel will hereinafter be referred to as the Trustee; the Metropolis Construction Company as the Company; the Portuguese-American Bank as the Bank; Thomas F. Boyle as the Auditor and the City and County of San Francisco as the City. No issues were [104] raised as to the identity of the respective parties or as to their respective positions or capacities as alleged in the bill of complaint.

The pleadings before the Referee are the bill of complaint as amended; the order to show cause, made herein on April 19, 1911; the answer of Auditor Boyle, which is also his return to said Order to Show Cause; the amended return of the Portuguese-American Bank to the Order to Show Cause.

This suit concerns the claims made by the various parties to a paper demand or warrant in the possession of the Auditor, and being a **warrant for payment** of the fourth progressive payment under a certain contract, hereinafter referred to, for the construction of sewers in Kentucky and Fourth Streets, San Francisco.

Prior to the taking of testimony the Bank saved its objections to the jurisdiction of the Court. The testimony and evidence adduced by the Bank are in support of its amended return filed to the Order to Show Cause.

I find the following facts:

That during the year 1910 the Directors of the Company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reincke; that the officers of the Company were: Chris Emille, President and General Manager; A. W. Reincke, Treasurer; Mrs. Jensine P. Emille, Secretary; L. F. Strong, Assistant Secretary.

That from the first day of November, 1910, until the adjudication of bankruptcy of the Company, J. A. Baptista was vice-president of the Company and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the Bank; [105] V. L. de Figueiredo, secretary and cashier;



and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the Company duly passed a resolution conferring on Chris Emille, the president of the Company, the powers of general manager of the Company, "with full and exclusive charge of the management and conduct of the affairs of the Company, with full power to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said Company"; that said resolution or authority conferred thereby was never cancelled or revoked by the Company (Ex. No. 4).

That on or about July 22, 1910, the Board of Public Works of the City entered into a contract with the Company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182 (Tr. p. 6); that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

#### "PAYMENTS.

In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the per-



formance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be [106] made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contract is not complying with the requirements of the contract and specifications."

The specifications annexed to the contract contain the following provision:

"No sub-contract shall relieve the contractor of any liabilities or obligations. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto, unless

with like consent of the Board of Public Works.”

That on or about the 30th day of July, 1910 (Tr. p. 18), this contract was sub-let by the Company of the complainant, Paul I. Welles. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was [107] completed by the complainant under the receivers and the trustee (Tr. pp. 18, 57).

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work on the contract done prior to December 1, 1910, and his estimate amounted to \$9,107.80. (Tr. p. 48.) This estimate was approved by the Board of Public Works of the City on December 5, 1910. (Tr. p. 9.) Said board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the Company was approved by the Board of Public Works, and the demand, so approved, was forwarded to the Board of Supervisors of the City. The said demand and estimate of the City Engineer are set out on pages 45 to 48 of the transcript.

That thereafter, on December 5, 1910, Chris



Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary called at the office of the bank; that they saw V. L. de Figueiredo, the secretary and cashier of the Bank, and Mr. Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the City in favor of the Company, and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows (Tr. 117 to 123):

“San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:— [108]

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the un-



dersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17 being fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20 being fourth progressive payment on account of contract between the undersigned and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets under contract No. 31.

METROPOLIS CONSTRUCTION COM-  
PANY, INC.

By CHRIS EMILLE,  
President.

By L. F. STRONG,  
Ass't. Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office Dec. 6, 1910.

Ans. H. J." [109]

That said warrant mentioned in said order for said fourth progress payment on said contract for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth

progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor (Tr. p. 117).

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon "Received Auditor's office Dec. 6, 1910. Ans. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth herein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68. [110]

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by



the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the President of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the Company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714. [111]



That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and authorized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order: That on and about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Co. for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. (Tr. p. 37.) On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof

was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11 o'clock and five minutes A. M., a petition was filed in this court praying that said [112] Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances (Tr. p. 123) on the same kind of paper (Tr. p. 106) having reference to the third progress demand on said Fourth and Kentucky contract (Tr. pp. 132, 133), and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto, who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payments upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were



made. (Tr. 133.) The cashier held an order empowering the Bank to draw the warrants in favor of the Company. (Exhibit 6.) The cashier received from the Auditor the paper demands for the third progress payments, such demands being in the name of the Metropolis Construction Co. when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Co. and for that reason Mr. Strong signed them. (Tr. p. 139.) Mr. de Figueiredo testified that the only thing the Auditor had was an order to deliver those orders to us (the Bank). [113] (Tr. p. 138, Ex. 6.) The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid (Tr. p. 124), but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by said board on January 3, 1911, and re-



ceived the approval of the Mayor of the City on January 4, 1911 (Tr. pp. 29, 38, 47½, 72); that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession.

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter governing the city during the year 1910.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof. (Tr. pp. 35, 36.)

On December 2, 1910 (Tr. p. 53) the Auditor received a letter from the Metropolis Construction Co., reading as follows: [114]

“San Francisco, Cal., December 2, 1910.

“To Thomas F. Boyle, City and County Auditor,  
San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2,-990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed)      METROPOLIS CONSTRUCTION  
CO., INC.

CHRIS EMILLE, Pres.

“[Seal of the Corporation attached.]”

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit “D” These claims have

all been paid with the exception of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky contract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Co. on account of money loan to the Metropolis Construction Co. The said Central Trust Co. has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Co. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City, to the demand in controversy, and the City makes no [115] claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Co. (Tr. p. 471½.)

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

That on December 23d, 1910 (Tr. p. 56), the Court,

in the case of Metropolis Construction Co., Bankrupt, appointed three Receivers, John B. Daniel, A. B. Tognazzi, and Edmund F. Greene. These receivers immediately qualified and took possession of all of the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract (Tr. p. 56), continuing the work on this contract through the subcontractor, Mr. Paul I. Welles (Tr. p. 57).

Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910 (Tr. pp. 42, 43), the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Co. and purporting to revoke any powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, (Tr. p. 57), one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911 (Tr. p. 41), the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the



bankrupt by the City under any contracts entered into between [116] the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.

That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the trustee in bankruptcy. This final payment amounted to \$11,149.64. (Tr. pp. 49, 50). The demand for this amount was delivered by the Auditor to the defendant John Daniel, as trustee of the estate of bankrupt, and the proceeds thereof used in partial payment of the secured claim filed by Paul L. Welles in bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract on July 30th, 1910, with the Metropolis Construction Co. to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Co., and subsequently under the receivers and subsequently under the trustee, appointed by this Court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice (Tr. p 23) to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the Complaint. This notice was in the sum of \$8,500.00, and required the withholding of moneys due the Metropolis Construction Co., contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was

acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910 (Tr. p. 44); upon the Board of Public Works, December 12th, 1910 (Tr. p. 33); and upon the Board of Supervisors of the City, December 12th, 1910 (Tr. p. 55).

That on December 15th, 1910, complainant herein made an amended [117] notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910 (Tr. pp. 15-45); upon the Board of Public Works, December 16th, 1910 (Tr. pp. 16, 33, 34); and upon the City, December 19th, 1910, by service on the Mayor of the City (Tr. p. 16). It specifies the amount due the complainant as \$20,265.02. (Ex. "D" annexed to complaint, p. D6, lines 1-2).

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B" annexed to the Proof of Secured Debt, filed by Paul I. Welles in the bankruptcy proceedings. (Tr. pp. 15, 55, 44, 45, 33, 34, 58, 130.)

That the complainant (Tr. pp. 17, 18) filed his proof of secured debt in this court in the matter of Metropolis Construction Co., bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the trustee in bankruptcy



and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the trustee is \$13,010.26. (Tr. pp. 19-27.)

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05 (Tr. p. 19), upon the conditions named in the following paragraphs regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt (Tr. p. 20). The bankrupt has not been called upon to pay these notes (Tr. p. 20). It, however, [118] may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that, if Mr. Welles shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit: \$8,792.06 plus \$4,218.20 or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the trustee in bankruptcy, he would upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money



and thus release the Bankrupt (Tr. p. 135).

That on January 26, 1911, *mandamus* proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that complainant herein never made a request on the trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, [119] and is not a party thereto.

The costs in this proceeding are as follows:

Paid by complainant to reporter...\$ 72.30

Paid by defendant to reporter..... 61.30

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Total.....\$133.60

The referee has not been paid for his services, and he respectfully requests the Court to fix his compensation. Those services consist of attendance in hearing of the case, five days, and the preparation of this report.

ARMAND B. KREFT,

Referee in Bankruptcy.

Dated San Francisco, October 13, 1911.

Filed Oct. 14, 1911, at 11 o'clock and 20 min. A. M.  
[120]

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[Title of Court and Cause.]

**Replication [to Answer of Portuguese-American  
Bank of San Francisco].**

REPLICATION OF PAUL I. WELLES, COM-  
PLAINANT, TO THE ANSWER OF PORTU-  
GUESE-AMERICAN BANK OF SAN FRAN-  
CISCO, DEFENDANT.

This replicant, Paul I. Welles, saving and reserv-  
ing to himself all and all manner of advantages  
of exception which may be had and taken to the  
manifold errors, uncertainties and insufficiencies  
of the answer of the defendant, Portuguese-Ameri-  
can Bank of San Francisco, a corporation, for rep-  
lication thereunto saith that he doth and will aver,  
maintain, and prove his said bill to be true, cer-  
tain, and sufficient in the law to be answered unto  
by the said defendant, and that the answer of the  
said defendant is very uncertain, evasive and in-  
sufficient in law to be replied unto by this replicant;  
without this, that any other matter or thing in the  
said answer contained, material or effectual in the  
law to be replied unto, and not herein and hereby  
well and sufficiently replied unto, confessed, or  
avoided, traversed or denied, is true; all which mat-  
ters [121] and things this replicant is ready to  
aver, maintain, and prove as this Honorable Court

shall direct and humbly prays as in and by his said bill he hath already prayed.

October 16th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Receipt of a copy of the within Replication this 16th day of October, 1911, is admitted.

JAMES B. FEEHAN,

Attorney for Defendant, Portuguese-American  
Bank of San Francisco.

Filed Oct. 16, 1911. [122]

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**[Replication to Answer of John Daniel, Trustee, etc.]**

[Title of Court and Cause.]

REPLICATION OF PAUL I. WELLES, COMPLAINANT, TO THE ANSWER OF JOHN DANIEL, TRUSTEE OF THE ESTATE OF METROPOLIS CONSTRUCTION COMPANY, A CORPORATION, BANKRUPT, DEFENDANT.

This replicant, Paul I. Welles, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, for replication thereunto, saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain,



evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this replicant [123] is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

October 19th, 1911.

C. A. S. FROST,

Solicitor for Complainant.

Due service and receipt of the within Replication is hereby admitted this 19th day of October, 1911.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

M. J. GREEN,

Attorneys for John Daniel, Trustee, etc., Defendant.

Filed Oct. 25, 1911. [124]

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[Title of Court and Cause.]

**Memorandum Opinion Confirming Report of  
Referee, etc.**

There does not seem to be any objection to the report and findings of the referee, and said report is confirmed, and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded

in the bill of complaint, and to its costs and disbursements herein.

This is not a proceeding in bankruptcy, but an independent suit in equity, and I find that the referee is entitled to be paid, as compensation for his services in this action, the sum of \$60.00.

LET A DECREE BE ENTERED IN ACCORDANCE WITH THIS MEMORANDUM.

Dated December 12th, 1911.

JOHN J. DE HAVEN,  
Judge.

Filed Dec. 12, 1911. [125]

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**[Order Confirming Report and Findings of Referee,  
etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of December, in the year of our Lord one thousand nine hundred and eleven.  
Present: The Honorable JOHN J. DE HAVEN.

#15,148.

PAUL I. WELLES

vs.

JOHN DANIEL, Trustee, etc., et al.

This case having been heretofore submitted to the Court for determination, the Court now files its written memorandum, and by the Court ordered that the report and findings of the referee be, and the same is hereby confirmed; further ordered that complain-

ant is entitled to the relief demanded in the bill of complaint, costs and disbursements herein.

Further ordered that the special referee be, and he is hereby allowed \$60 for his services herein.

Further ordered that a decree be entered accordingly. [126]

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[Title of Court and Cause.]

**Order [Confirming Report of Referee Granting Complainant an Injunction Pendente Lite, etc].**

Upon reading and filing the Order to Show Cause, made April 19, 1911, herein, the pleadings of the parties, and the findings and report of the referee, and after considering the briefs and arguments of counsel, it is

ORDERED that the said report of the referee herein be and the same is hereby confirmed and the referee is allowed sixty dollars for his compensation, one-half to be paid by complainant and one-half by defendant bank; and it is further

ORDERED that the complainant be and he is granted an injunction *pendente lite* restraining the defendant bank from prosecuting its mandamus proceeding referred to in said order to show cause, made April 19th, 1911, herein; and it is further

ORDERED that a writ of mandate issue requiring and directing the defendant, Thomas F. Boyle, to allow and approve the demand, to wit: The fourth progressive payment, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) dollars, mentioned in the bill of com-



plaint, as [127] amended herein, and to deliver the same to defendant, John Daniel, as Trustee, herein, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; and it is further

ORDERED that the complainant file a bond or undertaking upon the issuance of the said injunction in the penal sum of Eight Thousand Dollars.

JOHN J. DE HAVEN,

District Judge.

Dated December 13th, 1911.

Filed Dec. 13, 1911. [128]

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[Title of Court and Cause.]

**Writ.**

(Injunction and Mandamus.)

The President of the United States of America, to Portuguese-American Bank of San Francisco, a Corporation, Defendant, and to Thomas F. Boyle, Defendant, and to Their, and Each of Their, Attorneys, Servants, and Agents, Greeting:

WHEREAS: It has been represented to us in our District Court of the United States for the Northern District of California, in the Ninth Circuit, on the part of Paul I. Welles, complainant, that he has lately exhibited his Bill of Complaint as amended, in our said District Court against you, the defendants above named, and John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, touching the matters, therein, complained of; and our said Court having

thereupon, in this cause, ordered that said defendants show cause, [129] if any they have, at a time and place in said order specified, why the relief, prayed for in said Bill of Complaint, should not be granted, and said defendants having made return to said order and having appeared herein, by their respective counsel; and, thereupon, said matter having been fully heard upon said Bill of Complaint, as amended, said returns of said defendants, and upon the report of the Referee to whom said matter was referred for the purpose of taking evidence and finding facts herein, and upon the briefs and arguments of counsel; and upon the pleadings.

Now, therefore, we do strictly command and enjoin you, the said Portuguese-American Bank of San Francisco, a corporation, your attorneys, servants and agents, under the pains and penalties which may fall upon you, and each of you; in case of disobedience, that you desist and refrain from prosecuting, concerning the demand and proceeds hereinafter mentioned, that certain proceeding, mentioned in said Order to Show Cause, herein, made April 19, 1911, commenced January 26th, 1911, in the Superior Court of the State of California, in and for the City and County of San Francisco, by a petition filed in said Superior Court on the said last mentioned day, being numbered 33,836 in the records and files of said Superior Court, and now pending therein; which commands and injunctions, you are required to observe and obey, until said District Court shall make further order in the premises;

And we do strictly command, require and direct



you the said Thomas F. Boyle, to allow and approve that certain demand, to wit, for the fourth progressive payment on that certain contract, known as the Fourth and Kentucky Street contract, between the City and County of San Francisco, a municipal corporation and Metropolis [130] Construction Company, a corporation, bankrupt, mentioned in the Bill of Complaint, herein as amended, in the sum of Six Thousand Eight Hundred Thirty and Eighty-five Hundredths (\$6,830.85) Dollars, now held by you; and that you then immediately deliver said demand to John Daniel, defendant, herein, as Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, to abide the result of this action, the proceeds to be distributed to whomsoever shall be lawfully entitled; which command, requirement, and direction you are required to observe and obey under the pains and penalties which may fall upon you, in case of disobedience.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, the 15th day of December, Nineteen Hundred Eleven, and of the Independence of the United States of America the 136th year.

JAS. P. BROWN,

Clerk.

By Francis Krull,

Deputy Clerk. [131]



RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Injunction and Mandamus on the therein named Thomas F. Boyle by handing to and leaving an attested copy thereof with Thomas F. Boyle personally at San Francisco in said District on the 15th day of December, A. D. 1911.

C. T. ELLIOTT,  
U. S. Marshal.

By Paul J. Arnerich,  
Deputy.

Filed Dec. 18, 1911. [132]

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[Title of Court and Cause.]

**Order of Reference for Final Hearing.**

ORDERED, that this case be referred to A. B. Kreft, Referee, on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court.

Dated December 26, 1911.

JOHN J. DE HAVEN,  
Judge.

Filed Dec. 26, 1911. [133]

**[Order Referring Cause to Referee to Hear Testimony and Proofs, to Find Facts upon Issues Arising on Pleadings and to Report Findings and Conclusions.]**

[Title of Court and Cause.]

On motion of C. A. S. Frost, Esqr., J. B. Feehan, Esqr., attorney for defendant Portuguese-American Bank, being present and making no objection, the Court made and filed its order referring this cause to A. B. Kreft, Referee, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings, and to report his findings and conclusions to this Court. [134]

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**[Report of Referee, Filed March 8, 1912.]**

[Title of Court and Cause.]

To the Honorable, the Judges of the District Court of the United States, Northern District of California:

The undersigned, Referee in Bankruptcy, to whom, on the 26th day of December, 1911, was referred the above-entitled cause "on final hearing, to hear the testimony and proofs of the parties, to find the facts upon the issues arising upon the pleadings and report his findings and conclusions to this Court," respectfully reports as follows:

That said matter was regularly set for hearing on the 9th day of January, 1912, on which day I was attended upon by C. A. S. Frost, Esq., attorney for complainant, by Milton J. Green, Esq., attorney

for trustee, and by James G. Feehan, Esq., and Charles J. Heggerty, Esq., attorneys for defendant Portuguese-American Bank. No appearance was made on behalf of defendant Thomas F. Boyle.

At the commencement of the hearing herein counsel for defendant bank stated of record that said bank "specially appears, without [135] consenting to the jurisdiction of the referee or to the jurisdiction of the court over the Portuguese-American Bank or its rights or property interests, and protests against and objects to the jurisdiction of the referee to hear or determine any matters or proceedings involving the issues raised by the complaint or bill and the answer thereto, as also to the jurisdiction of the District Court of the United States to determine the same."

The question was raised as to whether the findings of fact made by the undersigned referee upon the reference herein to him "to hear the testimony and find the facts upon all issues made by the pleadings and report the same to the court," which report was filed October 14, 1911, and confirmed by the Court, are *res adjudicata* as to the facts found. The referee held that the confirmation of such findings by the Court was *res adjudicata* where the issues raised by the answer of the bank herein are the same as the issues raised upon the order to show cause and pleadings, before the referee at the time of making said report, but that on the present hearing the parties might introduce evidence as to any new issues raised by the answer of the bank. The answer of the bank was filed October



6, 1911, before the report of the referee was filed, but such answer was not before the referee upon the former hearing.

After some discussion it was stipulated that the whole record of the former hearing should be admitted in evidence upon this hearing (Tr. pp. 7 and 8); such admission being limited on the part of complainant to the use of such record upon any issue presented by the answer of the bank not raised upon the hearing of the order to show cause.

In addition to such record certain stipulations were made and certain documentary evidence was referred to. Counsel for the [136] bank read in evidence a portion of the contract between the Metropolis Construction Company and the City and County of San Francisco, under the heading "Sub-Contracts," which is set out in the transcript filed herewith, page 8. Such contract was put in evidence upon the former hearing.

It was stipulated "that the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now a legally created and existing banking corporation, doing business as such in the City and County of San Francisco" (Tr. p. 8); and "that the charter of the City and County of San Francisco, as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action desires to refer to and use, may be referred to and used as evidence." (Tr. p. 8.) Counsel for the bank also put in evidence that portion of such

city charter as is quoted on page 8 of its answer, lines 13 to 25. (Tr. p. 9.) The complainant made the following admission: "That there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, 'Paul I. Welles,' as the sub-contractor on the job." (Tr. p. 9.)

It was admitted that the United Railroads, on January 4, 1912, filed a claim in the bankruptcy proceedings of the Metropolis Construction Company. The referee finds that this claim is based upon the claim referred to as the claim of the United [137] Railroads in the findings of fact heretofore made by the referee.

No additional facts other than those embraced in the admissions and as stated in this report have been elicited; and the referee finds the facts upon the issues arising upon the pleadings to be as reported by him in his former report, together with the additional facts set out in this report.

The matter was submitted on briefs, and the final brief was filed on February 28, 1912, at which time the respective parties and the referee were acting upon the assumption that the present order of reference required the referee to report his conclusions upon all the issues raised by the answer of the



bank. In the memorandum of opinion of the Court herein, filed December 12, 1911, the Court says: "There does not seem to be any objection to the report and findings of the referee, and said report is confirmed and having fully considered said report and the pleadings herein, it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint, and to its costs and disbursements herein."

Having considered the matter and having examined all the records and papers in the case, the referee is of the opinion that the additional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the Court in its said memorandum of opinion. Treating the confirmation of the referee's report on the former hearing as *res adjudicata* as to the facts found, it follows that if the complainant was entitled to the relief prayed for upon such facts, he is entitled to such relief upon the record as now presented.

The referee notified the respective counsel of complainant and [138] defendant bank of this conclusion and was attended upon by them on March 4, at which time the scope of this reference was discussed; and the referee finally determined to send up this report, setting forth the conclusion reached by him, and ask the Court for its instructions as to further proceedings, if any.



The costs of this proceeding are as follows:

Paid by complainant to reporter....\$8.00

Paid by defendant to reporter.....\$8.00

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Total.....\$16.00

Respectfully submitted,

ARMAND B. KREFT,

Referee in Bankruptcy.

Dated San Francisco, March 9, 1912.

Papers transmitted herewith:

Transcript of proceedings on this reference;

Objection of Portuguese-American Bank of San  
Francisco to referee making and reporting  
conclusions of law;

Brief of defendant bank on final hearing;

Complainant's final brief;

Reply brief of defendant bank.

Filed Mar. 8, 1912. [139]

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[Title of Court and Cause.]

**Exceptions of Defendant Portuguese-American  
Bank of San Francisco to Referee's Report on  
Final Hearing.**

The defendant Portuguese-American Bank of San Francisco, excepts to the report of Hon. Armand B. Kreft, to whom this cause was referred on final hearing by order of this Court made and entered on the 26th day of December, 1911, on the following grounds:

First: For that said Referee has not reported his findings or conclusions to this Court, as required by said order of reference.

Second: For that said Referee has not reported therein any findings or conclusions upon which a proper decree in this cause can be based.

Third: For that said Referee has treated the confirmation of his former report on the hearing of the order to show cause herein, as *res adjudicata*, as to the facts and the relief, and [140] has erred in so treating said order of confirmation.

Fourth: For that said Referee has treated the order confirming his former report as an opinion of the Judge of this Court, that upon the facts set forth in said report that the complainant was entitled to the relief prayed for in his bill of complaint. That said Referee has erred in so treating said order, for the only matter then before the Court, wherein this Bank was concerned, was whether the relief set out in the order to show cause should be granted, *prior* to the determination of the action upon the merits.

Fifth: For that said Referee at page 2 of said Report finds that the stipulation for the admission of the whole record on the former hearing, in evidence on this hearing, was "limited on the part of the complainant to the use of such record upon any issue presented by the answer of the Bank not raised upon the hearing of the order to show cause"; whereas, he should have found that it was stipulated that all the evidence, testimony, proceedings, stipulations, exhibits and the whole record, in the former hearing, be considered as evidence on this hearing, with the same force and effect as if repeated here, subject to the objection of complainant that the

Court has not now the right to take further testimony upon the issues embraced in the report of the Referee on said former hearing.

This defendant respectfully requests that this cause be rereferred to said Referee to report his findings and conclusions to this Court, as required by said Order by Reference.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Solicitors for Said Defendant.

April 6th, 1912. [141]

Filed Apr. 6, 1912. [142]

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[Title of Court and Cause.]

**Order Allowing Amendment to Prayer of Bill of Complaint.**

On motion of complainant, there being no objection made, it is

ORDERED that complainant be and he is hereby permitted to make, serve and file herein, his amendment, dated February 23d, 1912, to the Prayer of his Bill of Complaint herein; and that said Bill of Complaint be amended accordingly.

Dated April 15, 1912.

JOHN J. DE HAVEN,  
Judge.

Filed Apr. 15, 1912. [143]



**[Order Referring Cause to Special Referee and Examiner to Report Facts, and Granting Motion to Amend Complaint.]**

[Title of Court and Cause.]

The exceptions of defendant Portuguese-American Bank of San Francisco to the referee's report on final hearing herein, and the motion for leave to amend the bill of complaint herein, this day came on for hearing, Charles J. Heggerty, Esqr., and James B. Feehan, Esqr., appearing for said defendant, and C. A. S. Frost, Esqr., appearing for complainant;

After hearing counsel for respective parties, by the Court ordered that this cause be, and the same is hereby referred to A. B. Kreft, Esqr., as Special Referee and Examiner, to ascertain and report the facts on his conclusions of law therefrom, on the testimony taken and on file herein, on the issues joined, without any reference to the findings and report upon which a preliminary injunction was based.

Further ordered that said motion to amend the bill of complaint be, and the same is hereby granted.  
[144]

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[Title of Court and Cause.]

**Amendment to Prayer of Bill of Complaint.**

Comes now the complainant, Paul I. Welles, and, by leave of Court thereunto, first had and obtained, makes and files the following amendment to the prayer of his Bill of Complaint in the above-entitled

action, now on file, and amends said prayer so as to read as follows, that is to say:

WHEREFORE, complainant prays that defendant Boyle, as Auditor, be required to surrender to defendant trustee, said Demand for Six Thousand Eight Hundred Thirty and Eighty-five One Hundredths (\$6,830.85) Dollars, the fourth progress payment, now held by him for account of said bankrupt; that said defendant Trustee, on behalf of said bankrupt, be required to account fully and finally with complainant; that defendant, Portuguese-American Bank, be required, by due process of this Court, to make answer hereunto and to assert herein its claim, if any it have, upon said demand, and to abide [145] the judgment and decree of this Court herein to be determined thereon; that said defendant bank, its attorneys, agents and servants, be perpetually enjoined from further proceeding with said application for a writ of mandamus in said Superior Court of the State of California; and that said defendant bank, in the meantime, be restrained from further proceeding with said mandamus application until the further order of this Court; and for an order directing said defendant bank in that behalf to show cause, if any it have, at a time and place therein to be stated, why it should not be so restrained.

1. That complainant is a creditor, holding security of the estate of Metropolis Construction Co., a bankrupt, according to the tenor of a certain order, allowing said claim and security, given and made in the matter of said bankrupt, pending in this court, numbered 6827, on the 13th day of April, 1911; and



2. That complainant, as such creditor, is entitled to payment in the course of administration of said bankrupt estate, out of any moneys, received by, or in possession of, the defendant, John Daniel, Trustee of the Estate of said bankrupt, from the City and County of San Francisco, State of California, as payment to the said bankrupt on account of that certain contract for the construction of sewers and appurtenances, in said City and County of San Francisco, known as the Fourth and Kentucky Street contract, number 6A; and

3. That complainant is entitled to payment out of the funds derived from said Fourth and Kentucky Street contract prior in order of payment, and in preference, to defendant Portuguese-American Bank of San Francisco, a corporation; and

4. That complainant be, and he is, granted a permanent [146] injunction against defendant, Portuguese-American Bank of San Francisco, a corporation, its officers, agents and attorneys, that it and they be perpetually enjoined from prosecuting, or in any manner proceeding with that certain action or proceeding wherein said banking corporation is plaintiff, and defendant herein, Thomas F. Boyle, auditor of the City and County of San Francisco, is defendant, commenced and filed January 26, 1911, in the Superior Court of the City and County of San Francisco, State of California, and numbered 33,836 in the records and files of said Superior Court; in so far as said action numbered 33,836 may, or does, concern a payment, or the demand therefor, or evidence thereof, known as the "fourth progress" pay-



ment alleged to be due Metropolis Construction Company, a corporation, on account of contract No. 6A, for the construction of sewers and appurtenances in Fourth and Kentucky Streets, San Francisco, California; and

5. Judgment against said defendant, Portuguese-American Bank of San Francisco, for complainant's costs and disbursements to be taxed.

And for such other and further relief as may be according to equity, and for his costs and disbursements herein.

PAUL I. WELLES,  
Complainant.

C. A. S. FROST,

Solicitor for Complainant. [147]

[Duly verified February 23, 1913.] [148]

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[Title of Court and Cause.]

**Stipulation [That Amendment may be Made to  
Prayer of Complaint].**

The foregoing amendment may be made and filed;  
all rights of defendant bank being reserved.

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Attorney for Defendant, Portuguese-American  
Bank of San Francisco.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for Defendant, John Daniel, Trustee.

EDWARD F. MORAN,

Attorney for Defendant, Thomas F. Boyle. [149]

Receipt of a copy of within Amendment this 15th day of April, 1912, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

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Attorney for Thos. F. Boyle, Defendant.

Filed Apr. 16, 1912. [150]

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[Title of Court and Cause.]

**Report of Referee [Filed July 16, 1912].**

To the Honorable, the Judges of the District Court of the United States in and for the Northern District of California:

The undersigned, Referee in Bankruptcy, to whom on the 15th day of April, 1912, this cause was referred as special referee and examiner, to ascertain and report the facts and his conclusions of law therefrom, on the testimony taken and on file herein on the issues joined, "without any reference to the findings and report upon which a preliminary injunction was based," respectfully certifies and reports:

This cause was submitted to the referee upon the record as made upon the order to show cause and upon the previous reference to the referee to make

findings of fact upon the issues arising upon the pleading, and report his findings and conclusions to this Court, dated December 26, 1911; no additional evidence being introduced under the reference of April 15, 1912.

The appearances before me were C. A. S. Frost, Esq., attorney for complainant; James B. Feehan, Esq., and Charles J. Heggerty, [151] Esq., attorneys for defendant, Portuguese-American Bank; Milton J. Green, Esq., attorney for John Daniel, trustee. No appearance was made on behalf of defendant Thomas F. Boyle upon the present reference.

For convenience of reference John Daniel will hereinafter be referred to as the Trustee, the Metropolis Construction Company as the Company, the Portuguese-American Bank as the Bank, Thomas F. Boyle, Auditor of the City and County of San Francisco, as the Auditor.

Counsel for the bank announced that the bank reserved its objection and exception to the jurisdiction of the Court. The pleadings before the referee are the bill of complaint as amended, the answer of Auditor Boyle and answer of John Daniel, trustee, and the answer of the Portuguese-American Bank. Upon the issues joined I find the following facts:

That the Portuguese-American Bank at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco; that John Daniel is a duly qualified and acting trustee of the estate of the Metropolis Con-



struction Company, bankrupt, No. 6827, pending in this court; that complainant, Paul I. Welles, is a citizen of the United States and of the State of California and a resident of Berkeley, in the northern district of said State; that Thomas F. Boyle, defendant herein, at all times mentioned in the complaint, continuously, has been the duly elected, qualified and acting auditor of the City and County of San Francisco; that the Metropolis Construction Company was at all times mentioned in the bill of complaint a corporation organized and existing under and by virtue of the laws of the State of California; that during the year 1910 the [152] directors of the company were Chris Emille, Mrs. Jensine P. Emille, his wife, and A. W. Reinicke; that the officers of the company were Chris Emille, president and general manager; A. W. Reinicke, treasurer; Mrs. Jensine P. Emille, secretary; L. F. Strong, assistant secretary.

That from the 1st day of November, 1910, until the adjudication of bankruptcy of the company, J. A. Baptista was vice-president of the company, and was assistant treasurer thereof; that during the year 1910 M. T. Frietas was president of the bank; V. L. de Figueiredo, secretary and cashier; and James B. Feehan, the attorney thereof.

That in January, 1910, the board of directors of the company duly passed a resolution conferring on Chris Emille, the president of the company, the powers of general manager of the company, "with full and exclusive charge of the management and conduct of the affairs of the company, with full power

to borrow money and to do and perform such other things as may be necessary from time to time to carry on and conduct the affairs of said company"; that said resolution or authority conferred thereby was never cancelled or revoked by the company.

That on or about July 22, 1910, the Board of Public Works of the city entered into a contract with the company for the construction of certain sewers and appurtenances in Kentucky and Fourth Streets for the estimated sum of \$33,182; that payments were to be made as the said work progressed, called "progressive" or "progress" payments, as provided in the specifications accompanying said contract, which are, in part, as follows:

#### "PAYMENTS.

"In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of [153] each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

"The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City Engineer the total value of the labor done and materials incorporated into



the herein proposed work since the last preceding estimate amounts to less than \$5,000.00. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

“Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer’s estimate.

“Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications.”

The specifications annexed to the contract contain the following provision: [154]

“SUB-CONTRACT: The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

“With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of



the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

“No sub-contractor will be considered unless the original contractor between the contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

“No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.”

That on or about the 30th day of July, 1910, this contract was sub-let by the company to the complainant, Paul I. Welles; that [155] there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Company to Paul I. Welles; that Mr. Welles acted as sub-contractor with the knowledge of the Board of Public Works and of its inspector of the job, all the time, openly and without any concealment; that he had his name in the telephone book and he had

his sign "Paul I. Welles" as sub-contractor on the job. Under the sub-contract the Company agreed to pay to Welles 90 per cent of the moneys to be received by the Company from the City under its said contract with the City.

The Company proceeded with the work under the contract, through its sub-contractor, the complainant, until three receivers were appointed by this court on December 23, 1910. The contract was completed by the complainant under the receivers and trustee.

That between the commencement of the work and December 5, 1910, three progress payments were made to the Company on the contract; that on December 3, 1910, the City Engineer made a fourth estimate of progressive work of the contract, and prior to December 1, 1910, and his estimate amounted to \$9,107.80. This estimate was approved by the Board of Public Works of the City on December 5, 1910. Said Board by resolution authorized a fourth progressive payment to be made to the Company in the sum of \$6,830.85. On the same day a demand for that amount on behalf of the company was approved by the Board of Public Works, and the demand so approved, was forwarded to the Board of Supervisors of the City. The said demand and said estimate of the City Engineer are set out on pages 45 to 48 on the transcript marked "Filed October 14, 1911."

That thereafter, on December 5, 1910, Chris Emille, the president of the Company, accompanied by L. F. Strong, assistant secretary, called at the office of the Bank; that they saw V. L. de Figueiredo,



[156] the secretary and cashier of the Bank, and Chris Emille asked him to let the Company have a loan of \$30,000, and offered as security to assign certain demands on the treasury of the city in favor of the Company and the moneys represented thereby, aggregating about \$38,000; that Mr. de Figueiredo conducted Mr. Emille to the president of the Bank, M. T. Frietas, for the purpose of negotiating said loan, and Mr. Frietas asked Mr. Emille what collateral the Company had to offer as security for the loan; that Mr. Emille produced an order on the Auditor of the City as follows:

“San Francisco, Cal., December 5, 1910.

Thomas F. Boyle, Esq.,

Auditor of the City and County of San Francisco.

Dear Sir:

You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco, is hereby authorized and empowered to draw the warrants in favor of the undersigned against City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st:—Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Streets Sewers, the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd:—Warrant for the sum of \$12,173.17, being



fourth progressive payment on account of contract between the undersigned and said City and County dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd:—Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned [157] and said City and County dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

METROPOLIS CONSTRUCTION COMPANY, INC.

By CHRIS EMILLE,  
President.

By L. F. STRONG,  
Ass't Secretary.

[Seal of Metropolis Construction Co.]

Received Auditor's Office. Dec. 6, 1910.

Ans. H. J."

That said warrant mentioned in said order for said fourth progress payment on said *constrect* for sewers and appurtenances in Kentucky and Fourth Streets is the same demand that is sued for in this action.

That accompanying said order were three resolutions of said Board of Public Works, one of which allowed to the Company the sum of \$6,830.85 as the fourth progress payment under said contract. The other two resolutions are not involved in this suit.

That said resolution for the payment of the fourth progress payment has not been revoked.

That when offered to the Bank on December 5, 1910, the said order on the Auditor did not bear the

impress of the rubber stamp showing receipt at his office; that said bank officials refused to accept the said order as collateral for the loan asked until it had been presented at the Auditor's office and accepted by the Auditor.

That on December 6, 1910, Mr. Strong went to the Auditor's office and had the order stamped with the words now appearing thereon, [158] "Received Auditor's Office Dec. 6, 1910. Ans. H. J.," and left a copy of said order with the Auditor; that on December 6, 1910, the said order, so stamped, was turned over to said Bank officials and approved by them, and the loan of \$30,000 was authorized to be made to the Company; that when said Chris Emille turned over said order to the Bank, he understood that it was an assignment for the Bank to draw the money from the treasury; that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein. A copy of the note for \$30,000 given to the Bank by the Company is to be found in the transcript, pages 67 and 68, and the resolution by the Board of Public Works allowing the fourth progress payment, on page 68.

That said order with said resolution of the Board of Public Works attached and said note for \$30,000 were thereafter, on December 6, 1910, delivered to the Bank; that after receiving the same the Bank placed the sum of \$30,000 to the credit of the Company; that said \$30,000 was drawn out on checks by the Company on the 6th and 7th days of December, 1910.

That on December 7, 1910, said Chris Emille, ac-



accompanied by L. F. Strong, again called at the office of the Bank; that Mr. Emille there saw Mr. de Figueiredo aforesaid and told him that the Company needed \$5,000 more to pay labor; that the Bank was amply secured by the assignment of \$38,000 made the day before, and was sufficiently warranted in allowing \$5,000 more.

That the application was referred to the president of the Bank by Mr. de Figueiredo, and that the sum of \$5,000 more was on that day allowed by the Bank to the Company on the same security; that a second note was drawn up and delivered to the Bank, a copy of which note is to be found on page 71; that the said sum of \$5,000 [159] was placed to the credit of the Company, and that the whole thereof, excepting \$1.06, was drawn out by the Company, on checks; that when said notes were made by the Company to the Bank, neither Mr. Frietas nor Mr. de Figueiredo had any knowledge, information or belief that the Company was not a solvent corporation, and did not know, and had no cause to suspect, that bankruptcy proceedings were contemplated by or against it; that they believed the reputation of the company, financially, to be good at said times.

That no portion of the \$35,000 loaned by the Bank to the Company as aforesaid has been repaid to the Bank; that no portion of the interest thereon has been paid; that on August —, 1911, said interest amounted to the sum of \$1,714.

That on Saturday, the 10th day of December, 1910, the Bank officials learned from the newspapers that the Company was in financial difficulties, and author-



ized the Bank's attorney, James B. Feehan, Esq., to look after the collection of said notes and notify the Auditor, the supervisors and the Board of Public Works that the Bank was the owner of the warrants set forth in said order; that on or about December 12, 1910, a letter was written to the Board of Supervisors at the instance of the president of the Board of Public Works, requesting that all demands against the City allowed to the Metropolis Construction Company for work performed under the jurisdiction of the Board of Public Works be withheld from final passage, until otherwise notified. On the same day, or shortly thereafter, certain demands, including the demand for the fourth progress payment, were returned to the Board of Public Works; that said last named demand there remained for about two weeks after such return; that on December 17, 1910, the Bank caused a letter to be filed with the Board of [160] Supervisors, addressed to the Auditor and to the Board of Public Works and to the Board of Supervisors, notifying them of the claimed assignment to the Bank for the fourth progress payment, together with other progress payments. A copy of the letter is marked "Defendant's Portuguese-American Bank Exhibit 5."

That on December 19, 1910, between 9:30 and 10 o'clock A. M., a copy of said letter was filed with the secretary of the Board of Public Works; that on December 19, 1910, about 9 o'clock A. M., a copy thereof was left with the Auditor; that on January 4, 1911, a copy was left with the treasurer of the City.

That on December 19, 1910, at the hour of 11

o'clock and five minutes A. M., a petition was filed in this court praying that said Company be adjudged a bankrupt.

That in November, 1910, the Bank made a loan under similar circumstances on the same kind of paper, having reference to the third progress demand on said Fourth and Kentucky contract, and being a paper in exactly the language of that given to the Bank by the Company on December 6, 1910, with reference to the fourth progress demand.

That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto; who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words "Received Payment" printed upon the demand. In the case of the third progressive payment upon which the Bank claims to have made similar loans, the demands were so receipted by L. F. Strong, assistant secretary of the Company. When the demands for the third progress payments were ready for delivery, the Bank's cashier went to the Auditor's [161] office. He was accompanied there by Chris Emille and L. F. Strong, whose name (L. F. Strong) appears in the body of the demands as the officer of the corporation by whom the demands were made. The cashier held an order empowering the Bank to draw the warrants in favor of the Company. The cashier received from the Auditor the paper demands for the third progressive payments,



such demands being made in the name of the Metropolis Construction Company when delivered to the cashier. The warrants were made out in the name of the Metropolis Construction Company. The cashier, Chris Emille and L. F. Strong, then went to the office of the City and County Treasurer, and Mr. Strong signed his name under the words "Received Payment." The money was taken away by the cashier, in an automobile, and taken to the Bank, Mr. Strong and Mr. Emille tendering the use of the automobile for that purpose.

That Mr. de Figueiredo, the cashier of the Bank, knew that the fourth progress payment required the approval of the Board of Supervisors before it could be paid, but that on December 5, 1910, when the \$30,000 loan was made as aforesaid, he thought that the warrants had been passed upon by the Board of Supervisors, including the fourth progress payment.

That the demand aforesaid for the fourth progress payment, after being in the office of the Board of Public Works until about December 26, 1910, was returned to the Board of Supervisors, and was approved by the Board on January 3, 1911, and received the approval of the Mayor of the City on January 4, 1911; that said demand for the fourth progress payment was in the possession of officials of the City from December 5, 1910, to January 6, 1911, and after January 6, 1911, was in the possession of the Auditor, and continuously since last named date has remained in his possession. [162]

The provisions contained in the bill of complaint, paragraph XX, are provisions of the charter govern-



ing the City during the *City during the* year 1910. The quotations on page 8 of the answer of the Bank, lines 13 to 25, are provisions of the City charter.

The Board of Public Works of the City has never given consent to any assignment to the Bank of said contract or of the fourth progress payment upon said contract, or any part thereof.

On December 2, 1910, the Auditor received a letter from the Metropolis Construction Company, reading as follows:

“San Francisco, Cal., December 2, 1910.

To Thomas F. Boyle, City and County Auditor, San Francisco:

Dear Sir: Pay to the United Railroads of the City and County of San Francisco, the sum of \$2990.36, being sum to be deducted from moneys due us in the month of December, 1910.

Yours truly,

(Signed) METROPOLIS CONSTRUCTION CO.,  
INC.

CHRIS EMILLE,

Pres.

[Seal of the corporation attached.]”

The United Railroads on January 4, 1912, filed with the referee in the bankruptcy proceedings of the Company, a claim based upon the application which is the subject of this order.

Annexed to the answer of the Auditor in this case is a list of claims, Exhibit “D.” These claims have all been paid with the exception of that of Paul I. Welles, the complainant herein, out of the fifth and final payment on said Fourth and Kentucky con-

tract for \$11,149.64, which was turned over to the trustee in bankruptcy.

Annexed to the answer of the Auditor is Exhibit "A," being a notice dated December 15, 1910, from the Empire State Surety Company, that the performance of work on the Fourth and Kentucky Street contract has ceased. The work on said contract never [163] ceased, but was prosecuted continuously until the final completion and until it had been accepted by the City.

Exhibit "B," annexed to the answer of the Auditor, is a claim on behalf of the Central Trust Company on account of money loaned to the Metropolis Construction Company. The said Central Trust Company has appeared in the bankruptcy proceedings and filed its claim as a general creditor.

Exhibit "C," attached to said answer, is a claim of the Pacific Coast Casualty Company. It makes no reference to the contract in question.

The Auditor makes no claim on his own account or on account of the City to the demand in controversy, and the City makes no claim thereto. The said demand for the fourth progress payment on its face is payable to the Metropolis Construction Company.

The Auditor, in order to protect himself, is holding said demand until it is determined who is entitled thereto.

On December 23d, 1910, the Court, in the case of Metropolis Construction Company, bankrupt, appointed three receivers: John B. Daniel, A. B. Tognazzi and Edmund F. Greene. These receivers im-

mediately qualified and took possession of all the contracts of the Metropolis Construction Company with the City, of which there were several, including the Fourth and Kentucky Street contract, continuing the work on this contract through the sub-contractor, Mr. Paul I. Welles. Under the agreements of the Metropolis Construction Company with Mr. Welles, the receivers were obliged to furnish materials and some money in the completion of the contract.

That on the 29th day of December, 1910, the receivers notified the Auditor that they were the only persons lawfully entitled to receive or receipt for moneys due or payable from the City to the Metropolis Construction Company, and purporting to revoke any [164] powers theretofore given by the bankrupt to the defendant Bank or the United Railroads of San Francisco.

That on February 1st, 1911, the receivers appointed by the Court resigned, and on the same day, without any interregnum, one of these appointees, Mr. John Daniel, was made Trustee of the bankrupt's estate, and qualified.

That on February 3d, 1911, the trustee notified the Board of Supervisors and the Auditor, protesting against the drawing by, or delivery to, the Bank or to the United Railroads of San Francisco, of any warrant or warrants for moneys owing to the bankrupt by the City under any contracts entered into between the corporation and the City. This protest was in writing and was served upon the Auditor on February 3d, 1911.



That final or fifth progress payment on this contract, together with the amount withheld, was paid over to the Trustee in bankruptcy. This final payment amounted to \$11,149.64. The demand for this amount was delivered by the Auditor to the defendant John Daniel, as Trustee of the estate of the bankrupt, and the proceeds thereof were used in partial payment of the secured claim filed by Paul I. Welles in the bankruptcy proceedings.

That Paul I. Welles, the complainant, entered into a contract, on July 30th, 1910, with the Metropolis Construction Company to do all of the work under its contract with the City for the construction of sewers and appurtenances on Fourth and Kentucky Streets. Under the contractor, Metropolis Construction Company, and subsequently under the receivers, and subsequently under the Trustee appointed by this court, Mr. Welles prosecuted the work continuously and to final completion.

That on December 10th, 1910, Mr. Welles made a notice to withhold under Section 1184 of the Code of Civil Procedure of the State of California, Exhibit "C" annexed to the complaint. This notice was in the sum of \$8,500, and required the withholding of [165] moneys due the Metropolis Construction Company, contractor, under the contract No. 6A. This notice is in the language of Exhibit "C" annexed to the complaint. Service of this notice was acknowledged by the Auditor by telephone on December 10th, 1910, and it was actually served upon him on December 12th, 1910; upon the Board of Public Works, December 12th, 1910; and upon the Board

of Supervisors of the City, December 12th, 1910.

That on December 15th, 1910, complainant herein made an amended notice to withhold in the language of Exhibit "D" annexed to the complaint. This notice was served on the Auditor, on December 16th, 1910; upon the Board of Public Works, December 16th, 1910; and upon the City, December 19th, 1910, by service on the Mayor of the City. It specifies the amount due the complainant as \$20,265.02.

That said notices to withhold are in the words and figures of Exhibits "C" and "D" annexed to the complaint and of similar notices marked Exhibits "A" and "B," annexed to the Proof of Secured Debt filed by Paul I. Welles in the bankruptcy proceedings.

That the complainant filed his proof of secured debt in this court in the matter of Metropolis Construction Company, bankrupt, on March 1, 1911, claiming \$20,462.67, and setting forth his claim of security as required by the bankruptcy law, and claiming a first lien upon all moneys due the bankrupt from the City by reason of the notices to withhold and the law of the State.

That the accounts of Paul I. Welles with the bankrupt have been settled with the Trustee in bankruptcy and allowed, subject to the alteration of certain items upon conditions named in the order of allowance. The amount found due Mr. Welles after partial payment by the Trustee is \$13,010.26. [166]

That \$5,782.21 of this was paid to Mr. Welles, leaving a balance due to him at the present time of \$7,228.05, upon the conditions named in the follow-



ing paragraph regarding two certain notes.

That there are two notes amounting to \$4,218.20 made by Mr. Welles and endorsed by the bankrupt. The bankrupt has not been called upon to pay these notes. It, however, may be called upon to pay them, and the claim of Mr. Welles has been allowed for the amount due him, less said \$4,218.20; but it is provided in the order that if Mr. Wells shall pay said notes himself, or produce satisfactory evidence that the bankrupt has been released from all obligation thereunder on account of its endorsement of the notes, his claim shall stand approved as of April 14, 1911, in the full amount found due him, to wit, \$8,792.06, plus \$4,218.20, or \$13,010.26, which, less the \$5,782.21 paid him on account through the Trustee, would leave then due Mr. Welles \$7,228.05.

That Mr. Welles stipulated on the hearing that if the demand here in dispute be turned over to the Trustee in bankruptcy, he would, upon receipt of the amount of the fourth progress payment on the Fourth and Kentucky Street contract, give his receipt for the amount of the notes referred to, and that the trustee might pay them for him out of that money and thus release the bankrupt.

That on January 26, 1911, mandamus proceedings against the Auditor were commenced by the Bank to compel him to audit and deliver said demands, and others, to the Bank, and said proceedings are pending in the Superior Court of the State of California in and for the City and County of San Francisco, and that said Auditor has been served with an alternative writ of mandate and summons therein; that



complainant herein never made a request on the [167] Trustee to bring an action for the recovery of the demand or warrant in dispute, and that the Trustee never refused to bring such suit.

That said Auditor has not appeared in said bankruptcy proceedings, nor is he a party thereto unless made so by the process issued and his appearance in this suit.

That the Bank has not appeared in said bankruptcy proceedings, and is not a party thereto.

### CONCLUSIONS.

There are two main questions presented.

First, whether the fourth progressive payment in question was due to the Company and was the proper subject of an assignment when the alleged assignment to the Bank was made.

Second, does the evidence show that an assignment thereof took place?

The contract between the City and the Company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the City. The consent of the City was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the City, and can only be invoked by the City. This point is covered by defendant's brief, page 6, filed February 2, 1912.

On December 5, 1910, the Board of Public Works authorized the fourth progressive payment to be made to the Company. After such authorization, and on December 6th, 1910, the Bank made its loan

of \$30,000, and for which it claims it was given an assignment of demand against the city aggregating about \$38,000. \$5,000 additional upon the same assignment was loaned on December 7th, 1910. The fourth progress demand was approved by the Board of Supervisors on January 3, 1911, and by the Mayor of the City on January 4, [168] 1911. The notices to withhold were made by complainant Welles on December 10, 1910, and December 15, 1910.

Complainant claims that the fourth progress payment did not become due until approved by the Board of Supervisors, and that Welles, having given his notices to withhold before such approval, has a prior right to the fund. (Complainant's Brief, page 29.)

The Bank claims that the payment was due when the demand was approved by the Board of Public Works.

Both parties claim to be sustained in their contentions by the case of Newport Wharf & Lumber Company against Drew, 125 Cal. 585.

This case, it seems to me, covers the law upon three points of this branch:

First, a notice to withhold is equivalent to a garnishment of the moneys then due or to become due to the contractor;

Second, an assignment of a payment may not be made before the payment is due;

Third, an assignment after a payment is due takes precedence over a subsequent notice to withhold. This case involved the assignment of progressive payments under a contract with the board of trustees of a State asylum. For the purpose of determining



the amount of the progressive payments, the contract provided that the Superintendent of Construction should make certain estimates of work done. A certificate showing the labor performed and materials furnished was prepared in the form of a bill of account on behalf of the contractor, with the approval of the Superintendent of Construction endorsed thereon, and was then presented to the board of trustees for allowance and order for payment. Upon the allowance and order for payment of this bill a warrant was drawn by the State Controller in favor of the trustees for payment of the amount found due, and delivered to [169] them. At page 589 the Court say:

“The provision in the contract for the payment of 90 per cent of the value of materials used and labor performed as the work progresses, with the condition that before any payment should be made, the Superintendent of Construction should, not oftener than once a month, furnish an ‘estimate’ of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the acceptance of the work by the trustees. The contract provided that the work should be done to the satisfaction of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the obliga-



tion of the State which had been created in favor of the contractors by the trustees, became complete, and the right of the contractors to immediate payment became vested in them and was subject to their disposition."

The contract in the case at bar is in terms between the Company and the Board of Public Works, but has been referred to herein by me as a contract with the City, and provides that the work shall be done "under the direction and satisfaction of said Board of Public Works," and, "the said Board of Public Works in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, the Company for the work aforesaid. Following which is set out the prices fixed for the work. [170]

The contract then refers to the progressive payments for in the specifications annexed to and a part of the contract. Said specifications provide:

"That the City Engineer shall on or about the first day of each month make an estimate of the value of the labor done and the materials incorporated in the work. Upon each estimate being made the City shall pay or cause to be paid to the contractor in the manner provided by law an amount equal to 75 per cent of said City Engineer's estimate."

The charter of the City, Article 2, Chapter 1, Section 19, provides that all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the City Treasurer, be first ap-

proved by the Board of Supervisors; all demands for more than \$200 shall be presented to the Mayor for his approval in the manner hereinbefore provided for the passage of bills or resolutions.

Article 3, Chapter 1, Section 15, provides that the supervisors shall authorize the disbursements of all public moneys except as otherwise specially provided in this chapter.

Counsel for complainant (Brief, page 27) contends that the Board of Public Works is a mere adjunct to the Board of Supervisors, merely a superintendent of streets, referring to Article 6, Chapter 1, Section 7, of the Charter: "The Board (of Public Works) shall be successor in office and shall have all the powers and perform all the duties of the superintendent of streets" et cetera; and counsel contends that the Board of Public Works is on a par, so far as authority is concerned, with the superintendent mentioned in the case of *Newport News Company vs. Drew*, who approved the demand in that case when they initiated, and that the trustees mentioned in the *Drew* case constituted [171] the Board having the final right to approve payments under the contract, which like right resides in the Board of Supervisors, and that in both cases the demands are subject to a further audit before the final payment, but that the indebtedness is created and fixed by the approval and passage by the Board of Trustees, in the one case, and by the Board of Supervisors in the other; that the Board of Public Works can oversee, initiate, protect, but cannot make an obligation to pay money.



I do not agree with counsel in this contention that the Board of Supervisors corresponds with the Board of Trustees in the Drew case, as the body whose approval was necessary before the progressive payments became due.

It will be noted that the contract is between the Company and the Board of Public Works, which Board, under the charter, is empowered to make such contracts on behalf of the City, and that the work is to be done under the direction and to the satisfaction of such Board, and said Board contracts and agrees that the City will pay in the manner provided by law for such work. The Board of Public Works and not the Board of Supervisors fixes the amount of the progress payments.

The resolution allowing the fourth progress payment reads:

“Resolved, that the Metropolis Construction Company be and is hereby allowed the sum of six thousand eight hundred and thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street. Passed by the following vote: Ayes: Commissioners Newsom, Laumeister and Casey.

#### BOARD OF PUBLIC WORKS.

December 5, 1910.

Passed.” [172]

The specifications provide that the City Engineer shall make the estimates of work done; and if a parallel is drawn with the Drew case, he, in my opinion, would correspond to the superintendent of con-



struction therein mentioned, who endorsed his approval upon the bill of contractor, and which bill was ordered paid by the Board of Trustees. In like manner the Board of Public Works fixed and allowed the progressive payments upon the estimates of the City Engineer.

The contract provides that on the fulfillment of its covenants (which are the performance in a workman-like manner, to the satisfaction of the Board of Public Works, of the work contracted), the City will pay or cause to be paid in the manner provided by law the payment provided in the contract, and progress payments provided in the specifications. The Board of Public Works is the body to determine when the company is entitled to these progress payments and to advise the supervisors that the payment is due, which latter body provides for the payment of the money. The steps required, after the amount is found due the contractor by the Board of Public Works as aforesaid, are the steps of payment in the manner provided by law, to wit: The order of the supervisors on the Auditor to draw the warrant and the payment of the warrant by the City Treasurer.

In the Drew case the Court further said, referring to the time when the demand was subject to assignment:

“The provision in the contract for payment of the contract price in controller’s warrants on the state treasury did not affect this power of disposition, or right to immediate payment or suspend its exercise until such warrant should be obtained. The failure

or neglect to obtain a warrant immediately upon the approval of the estimates would have no greater effect than a similar [173] failure on the part of the contractor in the case of an ordinary completed contract, to obtain a check from the owner immediately upon receiving the architect's certificate that the installment is payable."

For the foregoing reasons I am of the opinion that the fourth progressive payment became due the Company on the 5th day of December, 1910, when approved by the Board of Public Works, and that the Company had a vested right therein, which was assignable, and that if an assignment was in fact made to the Bank, the Bank is entitled to the moneys payable under the demand, notwithstanding the notices to withhold, made by Welles.

Counsel for complainant claims that the order given by the Company to the Bank, addressed to the Auditor, and the facts and circumstances attending the transaction, and the conduct of the parties relating thereto, do not give rise to an assignment to the Bank of the fourth progress payment in question. The order reads as follows:

"Thomas F. Boyle,

Auditor of the City and County of San Francisco.

Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contract hereinafter set forth, to wit:



1st. Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth Street sewers, the contract being between the undersigned and said City and County under the bond issue of 1903." [174]

Which is the warrant in question? The order specifies other warrants, the total of warrants assigned aggregating \$38,171.32.

Counsel for complainant refers to the testimony of Mr. de Figueiredo, cashier of the Bank, quoting as follows: "The warrants were made out in the name of the Metropolis Construction Company, and the Auditor, the only thing that he had was an order to deliver those orders to us, although our name did not appear on the warrants, only on the order. Therefore, Mr. Strong signed them." The Mr. Strong referred to was the assistant secretary of the Company. Mr. de Figueiredo further testified in the same connection that "Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion."

This testimony related to a previous order given to the Bank upon a previous loan, and which order was in substantially the same words as the order in question, and complainant was permitted to show the conduct of the parties regarding such previous order for the purpose of showing the intention of the parties in regard to the warrant in question.

It further appears that on such previous order, when the warrant was ready for delivery, the cashier of the Bank and Mr. Strong went to the Auditor's



office and the warrant was delivered by the Auditor to the cashier; they then went to the treasurer's office and Mr. Strong, assistant secretary of the Company, endorsed the warrant and the money was turned over to the cashier, who took the same to the Bank.

The testimony shows that when the officers of the Bank were approached for the loan of \$30,000, Mr. Emille, president of the corporation, stated that as security for the loan they would give the Bank an assignment of certain demands, including said fourth progress demand. The officers of the Company and the officers of [175] the Bank all testify that an assignment of the said progress demands was intended. However it is a fair inference from the testimony that it was intended by the parties that the method followed on the previous transaction would be followed upon the collection of said demands, that is, that when the warrant was ready for delivery some officer of the Company would endorse the same in the same manner as upon the previous loan. I am satisfied from the evidence that the Bank did not intend to lend money without security, and that the Company offered as security to assign this demand. The security given the Bank by the Company was for a present consideration, and if I am right in my holding, that the payment was due the Company from the City, the claim, therefore, was property which the Company could rightfully assign. I am of opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the Auditor was

intended; that it was not the intention of the Company to reserve any right for its own use or benefit or at all, either to revoke the order on the Auditor or to collect the money.

The language used by the United States Supreme Court in the case of *Fourth Street National Bank vs. Yardley*, 165 U. S. 634, on commenting on the facts in that case, I deem appropriate to the facts in the case at bar. This is a leading case, involving the doctrine of equitable assignment and held, quoting from the syllabi:

“While an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet if in the transaction connected with the delivery of the check it was the understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of the specific fund, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers and parties charged with notice.” [176]

With respect to the facts, the Court uses the following language:

“It could not be reasonable conceived that the loan would be made without reference to the assignment of the fund from which alone the hope of immediate payment was to be reasonably expected. . . . The transaction, therefore, was a proposition to borrow on the one hand, accompanied by the disclosure that security was necessary, and tendering the security, and on the other hand, an acceptance of such proposal and an advance made on the face of it.”



The position of counsel for complainant is that said order on the Auditor, containing no words of conveyance, and it being necessary for an officer of the company to endorse the warrant before the same could be collected, the Company had not parted with control, and that no assignment of said demand has taken place.

Counsel for the Bank state in their brief that the Bank relies entirely upon its claim of assignment; that if it has not an assignment it has nothing. Many cases are cited. The counsel for complainant refers particularly to the case of *Christmas vs. Russell*, 14 Wallace, 69, 20 Law Edition, 762, in which the Supreme Court say:

“An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, no authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignment. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor.”

Counsel also refers to the case of the *Commercial National Bank vs. the City of Portland*, 37 Oregon, 33, a decision by Judge Bean, in which case the Court say: [177]

“An order from the contractor addressed to the



City Recorder, to deliver to the Company from time to time, as certain warrants shall be accepted, the warrants to be drawn by the City on a fund, equal in value to materials furnished by said Company used in such work, does not contain words of transfer or purport to assign an interest in the amount due or to become due from said City to said contractor, and is not directed to the Auditor or custodian of the funds, and hence is not a complete equitable assignment of the contractor's claim."

The Court further says:

"But, waiving this point," (the point that the order does not contain words of transfer, et cetera, which I have just quoted) "and assuming that in this respect the order is sufficient to constitute an equitable assignment, the fatal objection remains that it did not vest in the Fuel Company a right to the warrants or authorize the City Engineer to deliver them without the order of approval of Dill. It is only upon the presentation of bills for lumber, approved by Dill, that the City Recorder is authorized, under this order, to deliver warrants to the Fuel Company. The contract was not complete. Something remained to be done in the future by Dill before the right of the Company to the warrant should become absolute."

While the first portion of the decision quoted strongly supports the complainant's position herein, the latter quotation shows that the case is distinguished from the case at bar upon the facts.

The question has been briefed at length upon the assumption that the alleged assignment involves

the doctrine of equitable assignment. After a careful examination of the cases and the law of this State as found in the State codes and decisions of [178] the State courts, I am of opinion that the question presented does not involve the doctrine of equitable assignment.

The doctrine of equitable assignment as applied to choses in action arose because of the common law rule that choses in action were not assignable, and, as in other instances, equity found a method to accomplish what could not be done at law. Story in his work on Equity Jurisprudence, 13th Edition, Vol. 2, page 347, says:

“It is a well-known rule of common law that no possibility, right, title or thing in action can be granted to third persons. For it was thought that a different rule would be the occasion of multiplying contentions and suits, as it would in effect be a transfer of a law suit to a mere stranger. Hence a debt or other chose in action could not be transferred by assignment except in case of the king. . . . At law, with the exception of negotiable instruments and some few other securities, this still continues to be the general rule unless the debtor assents to the transfer; but if he does assent, then the right of the assignment is complete at law, so that he may maintain a direct action against the debtor upon an implied promise to pay him the sum, which results from such assent.”

And at page 366, in discussing trusts and equitable assignments, he states the following:

“Indeed, any order, writing or act which makes

an appropriation of a fund amounts to an equitable assignment of that fund. The reason is that the fund being matter not assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in equity. . . . An assignment of a debt may be by parole as well as by deed.” [179]

The authorities all emphasize the necessity of an appropriation of the fund, and without which there can be no equitable assignment. As stated by Mr. Justice Story: “Appropriation is all the nature of the case admits.” And this is the foundation of the doctrine. Out of this grew the holding that a failure to surrender control was inconsistent with an appropriation, that any power of revocation or power to collect was fatal to the assignment. But in this State, “under the code there is no limitation upon the power to assign choses in action, and such an assignment carries the legal title.”

*Curtin vs. Kowalsky*, 145 Cal. 434.

And this is true even if the assignment is for security only.

In the case of *Gilman vs. Curtis*, 66 Cal. 116, the Court says:

“Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant, to be held by him as collateral security for certain advances to be, and which were made by him, the legal title to the policy passed by the assignment to the defendant. The Court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive



from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of facts, is in what remains of it after the advances, for the security of which it was assigned, have been satisfied, and defendant cannot be made to surrender it to plaintiff until the advances made by him are repaid."

There being no limitation upon the transfer of choses in action, the question as to whether or not an assignment took place is to be determined by the rules which govern the transfer and the passage of title to personal property. I find the following provisions in the Civil Code of this State, relating to this subject:

"Section 954: A thing in action arising out of the violation of the right of property or out of an obligation may be transferred by the owner."

"Section 1458: A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such." [180]

"Section 1044: What may be transferred. Property of any kind may be transferred, except as otherwise provided by this article."

The only exception mentioned in the article is under Section 1045: "Possibility. A mere possibility not coupled with an interest cannot be transferred."

"Section 1052: When oral. A transfer may be made without writing in every case in which a writing is not expressly required by statute."

The tranfer in question does not come within Section 1624, "What contracts must be written."

"Section 1039: Transfer what? Transfer is an

act of the parties or of the law by which the title to property is conveyed from one living person to another.”

“Section 1083: What title passes. A transfer vests in the transferee all the actual title to the thing transferred which the transferee then has unless a different intention is expressed or is necessarily implied.”

“Section 1084: Incidents. The transfer of a thing transfers also all its incidents, unless expressly excepted. But the transfer *for* an incident to a thing does not transfer the thing itself.”

“Section 1140: Transfer of title under sale. The title to personal property sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.”

I find no similar provision relating to assignments, but the rule undoubtedly applies to assignments. The word “sale” is applied to a transfer of title to property reduced to possession and the word “assignment” to a transfer of title to property not [181] reduced to possession.

*Cross vs. Sacramento Savings Bank*, 66 Cal. 466.

I am of opinion that every requirement of the code relating to the transfer of personal property is present in the transaction under consideration. The demand was the property of the Company. The Company intended to transfer it as security to the Bank, the Bank paid a present consideration, and the Company received it, and there was a present intent to transfer all the interest of the Company in the re-

spective claims against the City intended to be assigned, to be held by the Bank as security, and therefore the legal title passed to the Bank. What steps the Bank intended to take to collect the money, or what the Company agreed to do to help the Bank collect the money, is immaterial. As the holder of the legal title, the Bank could compel the Company to endorse the warrants or it could proceed against the City direct by suit, if the treasurer refused to recognize its authority to collect the warrants.

In the case of *Scheerer vs. Edgar*, 76 Cal. 569, the Court say:

“In this case the course of the Auditor in making his warrant payable to Friedhofer was proper, notwithstanding the assignment, because the judgment was payable to him, and the order of the Board of Supervisors directed that the amount should be so paid. Having drawn a proper warrant, the duty of the Auditor was ended, and he certainly cannot be compelled to draw a second warrant, still less, to draw one in favor of a party who is not entitled to it under the order of the Board. The assignment of the judgment gave to the plaintiff the right to the warrant when it was drawn, and to compel Friedhofer to execute a proper transfer thereof to him, if he refused to do so, but it did not give him the right to compel the Auditor to draw a warrant not authorized by law.” [182]

Counsel for plaintiff states that this case is not in point, because this assignment was a legal assignment; that there was no question about the assignment; and further, that the statement of the Court



that Friedhofer could compel the endorsement, is *obiter dictum*. If I am correct in my conclusion that the facts constitute an assignment under the code, the assignment is a legal assignment. It is a transfer of the legal title to the Bank under the code, and the Bank stands in the same position as the judgment assignee in the Friedhofer case.

Considering the matter from the standpoint of an equitable assignment, I am also of opinion that the facts of the case constitute an equitable assignment within the rule of *Christmas vs. Russell*, above referred to. There was in fact a surrender of control, in that the Company was not in a position to collect the demand itself, it having parted with its right to receive the warrant, nor was it in a position to revoke the order upon the Auditor, the same having been given for a valuable consideration, nor to do anything by which it could control for its own use and benefit the claim due from the City. I believe that the control intended by the doctrine of equitable assignment is the retention by the assignor of some right over the fund which he is in position to enforce, either for his own benefit or for the benefit of another. I believe that a promise on the part of the company to endorse the warrant when the same should be ready, without any intention to reserve to itself the right to refuse to endorse the same—and the record does not show that the right to endorse this warrant was reserved by this Company for any purpose whatsoever—is not inconsistent with the existence of an equitable assignment. The thing assigned was not the warrant, but the demand or claim against

the City. The order on the Auditor is a sufficient appropriation. The words that the Bank is "authorized [183] and empowered to *draw* the warrants in favor of the Company" have a further significance than merely to receive the paper warrant, and in my opinion embraces the payment of the money to the Bank. The Bank could enforce its claim by suit against the City without endorsement of the warrant.

In the case of *McIntyre vs. Hauser*, 131 Cal. 11, the Court say:

"In order to constitute an equitable assignment of a debt, no express words to that effect are necessary, if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment would have been held to have taken place."

Counsel for complainant emphasizes the words of *Christmas vs. Russell*, that "the intent to transfer *and its execution*" are indispensable. Under the rule as laid down in *McIntyre vs. Hauser*, if the intent to transfer title existed, the passage of title takes place. And I have found that such intent existed in the case at bar. If there is any inconsistency between the rule of *McIntyre vs. Hauser* regarding equitable assignment and the rule as laid down in *Christmas vs. Russell* and the other cases referred to, the rule as announced by the Supreme Court of this state is the controlling law between these parties.

As a conclusion of law I find:

That the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910,

assigned by the Company to the Bank as security for the repayment of loans amounting to \$35,000 made by the Bank to the Company, and that said assignment and the right of the Bank to receive the moneys due upon said fourth progress payment are not affected by the notices to withhold made by complainant. [184]

Respectfully submitted,

ARMAND B. KREFT,

Special Referee and Examiner.

San Francisco, July 12, 1912.

The costs of this proceeding are the *reparation* and expenses of this report, shorthand and typewriting, amounting to \$35.

The referee has received no compensation for his services herein, and respectfully requests the Court to allow a reasonable fee therefor.

Filed Jul. 16, 1912. [185]

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[Title of Court and Cause.]

**Exceptions of Paul I. Welles, Complainant, to Report of Referee and Examiner.**

EXCEPTIONS of Paul I. Welles, Complainant, to the Report of Hon. Armand B. Kreft, Referee in Bankruptcy, as Special Referee and Examiner Herein, to Whom This Cause was Referred by Order of This Court Made and Entered on the Fifteenth Day of April, Nineteen Hundred Twelve, and Who Filed Said Report July Sixteenth, Nineteen Hundred Twelve.

The complainant excepts to said report:



FIRST EXCEPTION: For that said referee and examiner in said report, on page two thereof, has given the bankruptcy proceeding entitled “In the Matter of the Estate of Metropolis Construction Company, a Corporation, Bankrupt,” the number 15,148, which is the number of this cause, whereas the said referee and examiner should have reported the number of said bankruptcy proceeding as number 6,827. [186]

SECONDE EXCEPTION: For that said referee and examiner has in said report, on page fifteen thereof, stated as his conclusion that the Supreme Court of the State of California, in the case entitled “Newport Wharf & Lumber Company against Drew,” 125 California Reports, 585, held, among other things, that “an assignment of a payment cannot be made before the payment is due,” whereas the said referee and examiner should have concluded that the Court in said case against Drew held (not that an assignment could not be made at all, until the payment was due, but) that an assignment of a payment can not be made before the payment is MATURED, so as to take precedence over a notice to withhold.

THIRD EXCEPTION: For that said *fereree* and examiner in said report, on page sixteen thereof, finds that the contract with the city provides for the making of payments “in the manner provided by law” without mentioning, whereas said report should find, in that connection, that said *contrac* also provides that progress payments—like that involved in this action—“may at any time be withheld” upon certain stated conditions.

FOURTH EXCEPTION: For that said referee and examiner in said report, on page nineteen thereof, concludes that the fourth progress payment became due the Metropolis Construction Company, bankrupt, on the sixth day of December, 1910, when approved by the Board of Public Works and that said company had a vested right therein which was assignable and that if an assignment was in fact made to the bank, the bank is entitled to the moneys payable under the demand notwithstanding the notices to withhold made by Welles, whereas he should have concluded that in as much as the [187] demand for the fourth progressive payment, having been approved by the Board of Public Works December 5, 1910, and then "withheld" by that Board until after December 25, 1910, did not receive the approval of the Board of Supervisors until January 4, 1911, after Welles gave his notices to withhold (December 12 and 15, 1910), said fourth progressive payment was not MATURED until the said fourth day of January, 1911, nor at the time said notices to withhold were given by Welles, and that, consequently, the Metropolis Construction Company did not have any right to immediate payment thereof until January 4, 1911, nor at the time of said notices of Welles, and, hence, that the assignments or attempted assignments by said company on December 6th and 7th, 1910, to the Portuguese Bank were subject to the prior right of Welles under said notices to withhold.

FIFTH EXCEPTION: For that said examiner and referee (on page twenty-six) in said report, con-



cludes that on December 6th and 7th, 1910, the Metropolis Construction Company, by borrowing money from the bank, intending to give it an assignment, but in fact given it a paper writing limiting its authority, to receiving a warrant, from the city auditor, not the fund holder, made out in the company's name, at some future undetermined date, operated to make the bank, on said 6th day of December, 1910, the equitable assignee of said fourth progressive payment; whereas he should have concluded that said state of facts did not operate to give the bank control over the said fourth progressive payment for the reason that said warrant or demand has not then (december 6, 1910) come into possession of the said Auditor, and did not come into his possession until January 6, 1911; and also for the reason that when the bank should [188] receive possession from the auditor (under the authority it had from the company) the City Treasurer (who was the fund holder) could not safely pay the same and would not be compelled to do so although forbidden by the company, because the warrant required the signature of the company in whose name it then existed, which could only be obtained by the bank through persuasion (consent) or force (a lawsuit), and, hence, that said bank did not acquire an equitable assignment as of said December 6, 1910, of said fourth progressive payment, nor as of any date prior to January 6, 1911, the date when the said demand came into actual possession of said city auditor.

**SIXTH EXCEPTION:** For that said referee and examiner in said report errs in concluding that



said company on December 6, 1910, transferred to the Portuguese-American bank, and said bank received, a legal title to the fourth progressive payment, and for that said conclusion is against law.

**SEVENTH EXCEPTION:** For that said examiner and referee in said report concludes that the fourth progressive payment in the sum of \$6,830.85 was on the 6th day of December, 1910, assigned by the Metropolis Construction Company to the Portuguese-American bank of San Francisco as security for the repayment of loans amounting to \$35,000, made by the bank to the company, and that said assignment and the right of the bank to receive the moneys due upon said fourth progressive payment are not affected by the notices to withhold made by complainant, whereas said referee and examiner should have concluded that said fourth progressive payment was not assigned by said company to said bank on December 6, 1910, or at all; also, [189]

**EIGHTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that by the transactions of December 6, 1910, between the company and the bank and the paper received and accepted (and served upon the auditor) by the latter, the bank obtained, at most, merely a right to receive the warrant for said fourth progressive payment when it should come into the possession of the city auditor of San Francisco, which did not occur until January 6, 1911; also

**NINTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude,

where he should have concluded, that if any assignment exists in favor of said bank, arising from the facts found, it did not arise until January 6, 1911.

**TENTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the notices to withhold made by complainant.

**ELEVENTH EXCEPTION:** For that said referee and examiner in his said report omitted to conclude, whereas he should have concluded that any right which said bank may have acquired in said transaction of December 6, 1910, to said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy of said bankrupt, under the amendment of 1910, to the bankruptcy act, as "execution creditor."

**TWELFTH EXCEPTION:** For that said referee and examiner in said report did not conclude, whereas he should have concluded and found, that because no new testimony nor [190] evidence have been introduced on this hearing, his said report, filed July 16, 1912, being upon the facts as they stood of record on December 12, 1911, in this court and cause, between these parties, and because the facts as they thus stood of record on December 12, 1911, as appears by the report of this same referee and examiner then before the court (the transcript then on file being the identical transcript and evidence used on this hearing) are now, and were then, undisputed



facts and not findings upon any conflicting or contentious testimony, and because the court, on December 12, 1911, upon these admitted and established facts made its memorandum opinion and order directing a decree in favor of complainant (although it afterward made an interlocutory order whereby the bank should be given an opportunity to introduce further or new evidence if it desired, which it has not done); that such memorandum opinion and order of December is, under the unchanged state of the record, the law of the case in this court, and becomes conclusive, excepting only on review by an appellate court, and that complainant is, therefore, entitled to a decree as prayed. (*Lowe vs. California State Federation of Labor*, 189 Fed. Rep. 714, at page 715.—July 25, 1911, opinion by VAN FLEET, District Judge.)

THIRTEENTH EXCEPTION: For that said referee and examiner has in said report, on page twenty-one thereof, stated it as his opinion that the evidence clearly establishes that an assignment of the demand and not merely a right to receive the paper warrant from the auditor, was intended; that it was not the intention of the company to reserve any right for its own use or benefit or at all, either to revoke the [191] order on the auditor or to collect the money; whereas he should have, in said report, stated and found that the evidence in this cause is insufficient to establish that an assignment of the demand was intended, but establishes that merely a right to receive the paper warrant from the auditor was intended; that it was the intention of the company,



also, to reserve to itself the right to endorse the warrant, and also to be present at the collection of, and itself to collect, the money on the warrant, for the fourth progressive payment, and that it did in fact reserve to itself such right; also, that it did as a matter of law retain the right to revoke the order on the auditor, and also, to collect the money.

**FOURTEENTH EXCEPTION:** For that said referee and examiner in said report, on page six thereof, finds that when Chris Emille turned over said order to the bank he understood that it was an assignment for the bank to draw the money from the treasury, that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein; whereas he should have found and stated in said report that the evidence was insufficient to show said alleged facts, or any of them, and, also, that said Chris Emille then intended that said order should be merely authority for the bank to receive the warrants made out in the name of the construction company from the auditor when he should have them, thus making it incumbent upon the bank to request the company's signature before it could demand the money from the city treasury.

**WHEREFORE** complainant prays that an order be made directing a decree in favor of complainant as prayed for in his complaint as amended. [192]

August 14, 1912.

C. A. S. FROST,  
Solicitor for Complainant.

Receipt of a copy of within Exceptions this fourteenth day of August, 1912, is admitted.

JAS. B. FEEHAN,

CHARLES J. HEGGERTY,

Solicitors for Portuguese-American Bank of San Francisco, Defendant.

Filed Aug. 14, 1912. [193]

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[Title of Court and Cause.]

**Exceptions of John Daniel, Trustee of the Estate of Metropolis Construction Company, a Corporation, Bankrupt, Defendant, to Report of Special Referee and Examiner.**

Now comes the defendant John Daniel, trustee of the estate of Metropolis Construction Company, a corporation, bankrupt, and excepts to the findings of fact and conclusions of law filed herein by Hon. Armand B. Kreft, special referee and examiner herein, in the following particulars, to wit:

1. Said defendant adopts in this behalf and presents the exceptions filed herein by Paul I. Welles, complainant, to said report.

2. Said defendant excepts to the finding of fact by said special referee that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of \$38,000, to the Portuguese-American Bank, as security for the repayment of loans amounting [194] to

\$35,000, made by said bank to said company, because said finding is not warranted or sustained by the evidence.

3. Said defendant excepts to the conclusion of law of said special referee that said authorization to the Auditor of the City and County of San Francisco, as shown on pages 5 and 6 of said report, constitutes a legal or equitable assignment of said several fourth progressive payments or of the moneys represented thereby, because said conclusion is contrary to law.

4. That said special referee erred in his conclusion of law that said authorization was not affected by the notices to withhold given said Auditor by complainant herein, for the reason that said conclusion is contrary to law.

Respectfully submitted,  
MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant, John Daniel, Trustee.

Receipt of a copy of the within is hereby admitted this 16th day of August, 1912.

JAMES B. FEEHAN,  
CHAS. J. HEGGERTY,  
Attorneys for Complainant.

Filed Aug. 16, 1912. [195]



[Title of Court and Cause.]

**Order Submitting Exceptions to Report of Special Referee and Examiner.**

The exceptions to the report of the special Referee and Examiner filed herein on July 16, 1912, this day came on for hearing, C. A. S. Frost, Esqr., appearing for and James B. Feehan, Esqr., and Chas. J. Heggerty, Esqr., appearing against said exceptions, and thereupon upon motion of said Attorneys by the Court ordered that said exceptions be, and they are hereby submitted to the Court for determination upon the briefs on file. [196]

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**[Order Setting Aside Submission and Restoring Case to Calendar.]**

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 19th day of December, in the year of our Lord, one thousand nine hundred and twelve. Present: The Honorable JOHN J. DE HAVEN, Judge.

By the Court ordered that the submission in each of the following cases be, and the same is hereby, set aside, and said cases restored to the calendar, to wit:

\* \* \* \* \*

#15148.

WELLES

vs.

DANIEL.

\* \* \* \* \*

[197]

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[Title of Court and Cause.]

**Order Resubmitting Cause.**

Counsel for the respective parties being present in open court and consenting thereto, by the Court ordered that this cause be, and the same is hereby, re-submitted to the Court for decision, upon the briefs on file therein. [198]

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**[Opinion.]**

[Title of Court and Cause.]

DIETRICH, District Judge.

Upon consideration I have become satisfied that the conclusion reached by the referee or examiner is correct and that his report should be approved. The contention urged under the complainant's "point one" has caused me some hesitation, for I have no disposition to render a decision at variance with the previous rulings in the case, but upon reflection I am persuaded that it was the intention of Judge De Haven in reopening the case that it should be considered or reconsidered upon its merits; and such seems to have been the understanding of the referee.

As to the "second" and "third points," it is thought that the transaction between the officers and the Portuguese-American Bank and of the Metropolis Construction Company on December 5th, 1910, operated to assign the claim in question against the city, from the company to the bank, and that under the rule of *Newport Wharf and Lumber Co. vs. Drew*, 125 Cal. 585, the notice to withhold came too late to create a lien in favor [199] of the plaintiff.

My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want of vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice



until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally or specifically advised of the rights or interests of the plaintiff.

A decree will go against the plaintiff and in favor of the bank. [200]

As to the compensation of the referee or examiner, he presents a statement in which the time which he has given to the matter is estimated to be about ten days; he will therefore be allowed One Hundred (\$100.00) Dollars for his services.

Filed Jan. 18, 1913. [201]

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**[Order Entered January 18, 1913, Confirming Report of Referee and Directing Entry of Decree in Favor of Portuguese-American Bank of San Francisco, etc.]**

[Title of Court and Cause.]

This cause having been heretofore submitted to the Court for decision, now after due consideration had, the Court files its written decision, and by the Court ordered that the report of the referee herein be, and the same is hereby confirmed, and that a decree be entered in favor of the Portuguese-American

Bank of San Francisco, in accordance with the directions contained in said decision. Further ordered that the referee be, and he is hereby, allowed the sum of \$100, for his services herein. [202]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

IN EQUITY—No. 15,148.

PAUL I. WELLES,

Complainant,

vs.

JOHN DANIEL, Trustee of the Estate of  
METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt; PORTU-  
GUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation, and THOMAS  
F. BOYLE.

Defendants.

**Decree.**

This cause came on to be heard upon the report of A. B. Kreft, Esq., special referee and examiner, dated July 12, 1912, and filed herein July 16, 1912, and upon the exceptions taken to said report on the part of complainant Paul I. Welles, and also on the part of defendant John Daniel, trustee, and on the part of Pacific Coast Casualty Company and no other exceptions or objections to said report having been made or filed; and said cause having been argued by counsel, was on the 15th day of January, 1913, submitted to the Court for final judgment and decree, and after due deliberation had thereon the Court

finds, orders, adjudges and decrees as follows:

That the exceptions, and each of them, taken to the report of the special referee and examiner filed herein July 16, 1912, on the part of complainant, and on the part of defendant John Daniel, trustee, and also on part of the Pacific Coast [203] Casualty Company, be, and the same are hereby overruled, and that said report be, and the same is hereby in all respects confirmed.

That the compensation of said referee and examiner be, and the same is hereby fixed at the sum of \$100 and his expenses and disbursements at the sum of \$35; and that the same shall be paid out of said sum and taxed as costs against complainant and the said defendant John Daniel, as such trustee.

That complainant take nothing by his amended bill of complaint against defendant Portuguese-American Bank of San Francisco.

That said complainant take nothing by his amended bill of complaint against defendants John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

That defendant Portuguese-American Bank of San Francisco has a good and valid assignment of the fourth progress payment of \$6,830.85 referred to in said report, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder; that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are



not, affected by or subject to any notices to withhold made by complainant Paul I. Welles.

That defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by [204] him as such trustee to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

That the temporary injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

That said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

Dated January 30th, 1913.

FRANK S. DIETRICH,  
Judge.

Filed Jan. 30, 1913. [205]

[Title of Court and Cause.]

**Petition for Appeal by John Daniel, Trustee of the  
Estate of Metropolis Construction Company, a  
Corporation, Bankrupt, Defendant.**

The above-named defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, feels himself aggrieved by the Decree made and entered on the 30th day of January, 1913, in the above-entitled case; and does hereby APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith; and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [206]

AND said defendant John Daniel, Trustee as aforesaid, says that the defendants Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, have refused to join in this appeal; and complainant, Paul I. Welles, also, has not joined herein; and the said John Daniel, Trustee as aforesaid, further prays that due notice may issue and be served upon said Portuguese-American Bank of San Francisco, a corporation, and upon said Thomas F. Boyle, defendants, and said Paul I. Welles, complainant above mentioned, requiring them to show cause why they should not join in this appeal, or

sever their interests from the interests of this appellant.

Dated February 3d, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant John Daniel.

Receipt of a copy of the within Petition for Appeal this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant. [207]

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [208]

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[Title of Court and Cause.]

**Notice of Petition by Trustee in Bankruptcy for  
Severance on Appeal.**

The Portuguese-American Bank of San Francisco, a Corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, above named, ARE HEREBY NOTIFIED that at 10:00 o'clock A. M., at the courtroom of said court in the United States postoffice and courthouse in San Francisco, California, on the 8th day of February, 1913, the under-



signed, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant above named, will present to said Court his Petition for Appeal from the Decree rendered and entered January 30th, 1913, in the above-entitled court and cause, in which controversy Paul I. Welles is complainant and Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, and the undersigned Trustee, are defendants, or opposing parties; [209]

AND said Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, and Paul I. Welles, complainant, ARE HEREBY NOTIFIED that the undersigned, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant, is about to take said appeal, and they are hereby notified to unite therein or failing this, they will be made appellees.

Dated February 3, 1913.

MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee of the Estate of  
Metropolis Construction Co., a Corporation,  
Bankrupt, Defendant.

Receipt of a copy of the foregoing Notice this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant. [210]

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [211]

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[Title of Court and Cause.]

**Assignment of Errors, on Appeal of John Daniel,  
Trustee of the Estate of Metropolis Construction  
Company, a Corporation, Bankrupt, Defendant.**

NOW comes John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, Complainant, dated August 14th, 1912, to be not [212] well

taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately and specifically, as though the same were herein set forth in separate paragraphs. (Said Exceptions Nos. 2 to 13 were expressly adopted and presented by this defendant, John Daniel, Trustee, as and for his Exceptions also to the report of said Special Referee and Examiner, by the written Exceptions of said defendant Trustee, duly made and filed in said Court and Cause within the time allowed by law.)

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.

4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progress-



ive payment was not affected by the Notices to Withhold made by complainant. [213]

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings on December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, [214] bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), **and including said fourth progressive payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00) made by said Bank to said Company.**

13. In not holding that the evidence establishes that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.

14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that



said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment [215] or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the said demand and the said money and the proceeds thereof were not, and are not, affected by or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and,



in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved. [216]

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, defendant John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, prays that the Order and

Decree of said District Court of the United States,  
be corrected and reversed.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Solicitors for Defendant John Daniel, Trustee.

[217]

Receipt of a copy of within assignment of errors  
this 3d day of February, 1913, is admitted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Cor-  
poration, Defendant.

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant.

EDWARD F. MORAN,  
Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 4, 1913. [218]

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[Title of Court and Cause.]

**Petition by Complainant for Appeal.**

The above-named complainant, Paul I. Welles, conceiving himself aggrieved by the Order and Decree made and entered on the 30th day of January, 1913, in the above-entitled cause, DOES HEREBY APPEAL from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of

Errors, which is filed herewith; and he prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said Order and Decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 8th, 1913.

PAUL I. WELLES,  
Complainant.

C. A. S. FROST,  
Attorney for Complainant. [219]

The foregoing Claim of Appeal is allowed.

Dated February, —, 1913.

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Judge.

Receipt of a copy of the within petition by complainant for appeal, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,  
Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,  
Attorney for Thomas F. Boyle, Defendant.  
Filed Feb. 8, 1913. [220]



[Title of Court and Cause.]

**Assignment of Errors, on Appeal of Paul I. Welles,  
Complainant.**

NOW comes Paul I. Welles, complainant in the above-entitled action, and, having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Decree of said District Court, made and entered on January 18th, 1913, respectfully represents, as grounds of appeal and as assignment of errors herein, that said District Court erred in the following particulars:

1. In holding Exceptions Nos. 2 to 13, inclusive, to the report of Special Referee and Examiner, Hon. A. B. Kreft, herein, as said Exceptions appear on file herein on behalf of Paul I. Welles, complainant, dated August 14th, 1912, to be not well taken; and the action of said Court, in holding each of said Exceptions to be not well taken, is specified as error as to each of said Exceptions 2 to 13, separately [221] and specifically, as though the same were herein set forth in separate paragraphs.

2. In holding that the fourth progressive payment in controversy in said suit became due the Metropolis Construction Company, a corporation, bankrupt, and matured on the 6th day of December, 1910.

3. In not holding that any assignment made by the Metropolis Construction Company on the 6th day of December, 1910, was subject to a prior right acquired by complainant, Paul I. Welles, under his Notices to Withhold, made by him according to the statute law of the State of California on December 15th, 1910.

4. In holding that the paper authorization made by the Metropolis Construction Company, on or about December 6th, 1910, accompanied by a loan of money, and the facts found by the Referee as having occurred on that day, operated to constitute an assignment in favor of the Bank of the fourth progressive payment.

5. In holding that the right of the Bank (if any) to receive the moneys due upon said fourth progressive payment, was not affected by the Notices to Withhold made by complainant.

6. In not holding that said fourth progressive payment was not assigned by said Company to said Bank on December 6th, 1910.

7. In not holding that the paper authority and transactions of December 6th, 1910, between Metropolis Construction Company and the Portuguese-American Bank of San Francisco, operated merely to give said Bank a right to receive the [222] warrant for said fourth progressive payment, if and when it should come into the possession of the City Auditor (defendant Boyle).

8. In not holding that if any assignment whatever existed in favor of said Bank, it did not arise until January 6th, 1911.

9. In not holding that any right which said Portuguese-American Bank might have acquired by virtue of the proceedings of December 6th, 1910, in said fourth progressive payment, is subject to the Notices to Withhold made by complainant Welles December 15th, 1910.

10. In not holding that any right which said Bank



may have acquired in said fourth progressive payment is subject to the rights of the Trustee in Bankruptcy, defendant and appellant herein, under the Amendment of 1910 to the National Bankruptcy Act, by virtue of which said Trustee became "an execution creditor."

11. In not holding that the findings and report of said Special Master and Examiner, as adopted by the Order of said Court December 12th, 1911, were and are conclusive.

12. In that the evidence is insufficient to sustain the finding (adopted by the Court) of said Special Referee and Examiner, that said Metropolis Construction Company, a corporation, bankrupt, did, on the 6th day of December, 1910, assign the several fourth progressive payments mentioned in the authorization to the Auditor of the City and County of San Francisco, amounting to about the sum of Thirty-eight Thousand Dollars (\$38,000.00), and including said fourth progressive [223] payment, to the Portuguese-American Bank of San Francisco, as security for the repayment of loans amounting to Thirty-five Thousand Dollars (\$35,000.00), made by said Bank to said Company.

13. In not holding that the evidence established that it was the intention of the Metropolis Construction Company, in giving said written authority December 5th and December 6th, 1910, to said Portuguese-American Bank, to reserve the right to endorse the warrant, and to participate in the collection of the money on the warrant for the fourth progressive payment in controversy.



14. In not holding that said Metropolis Construction Company did, as a matter of law, reserve to itself the right to control the collection of said warrant for said fourth progressive payment.

15. In that the evidence is insufficient to justify the finding of said Special Referee and Examiner that when Chris Emille turned over said Order to the Bank on or about December 6th, 1910, he understood that it was an assignment for the Bank to draw the money from the treasury, and that he intended that said Order should be a complete assignment of the full amount of the three warrants set forth therein.

16. In holding that said Portuguese-American Bank has any right whatever, paramount to the rights of said complainant Welles, to the warrant for said fourth progressive payment or to the proceeds thereof.

17. In giving and making a Decree herein that defendant Portuguese-American Bank of San Francisco has a good and valid assignment of said fourth progress payment of Six Thousand [224] Eight Hundred and Thirty and Eighty-five One Hundredths Dollars (\$6,830.85) referred to in the report of said Special Referee and Examiner, and the demand therefor, and is the owner thereof and entitled to have and possess the same and all of the money due and payable thereunder.

18. In giving and making his decree that said assignment and the right of the Bank to have and receive the same demand and the said money and the proceeds thereof were not, and are not, affected by

or subject to any notices to withhold or to the said notices to withhold made by complainant Paul I. Welles.

19. In giving and making a decree that defendant Portuguese-American Bank of San Francisco have and receive and recover from and be paid by the defendant John Daniel, as trustee herein, the said demand for said fourth progress payment in the said sum of \$6,830.85, and that said John Daniel, trustee, forthwith deliver the said demand properly endorsed by him as such trustee, to said defendant Bank, and, in the event that said John Daniel has cashed said demand and received the proceeds thereof, then that he pay over and distribute to said defendant Bank such cash and all of the proceeds of said demand, together with any and all interest the same may have earned to the date of such payment.

20. In giving and making a decree that the Temporary Injunction awarded against said defendant Bank by the Court December 13, 1911, do stand dissolved.

21. In giving and making a decree that said defendant Portuguese-American Bank of San Francisco have and recover its [225] costs in this behalf expended to be taxed against the complainant and the said defendant John Daniel as such trustee herein.

22. In giving and making a decree herein that complainant take nothing by his amended bill of complaint against the defendant Portuguese-American Bank of San Francisco.

23. In giving and making a decree herein that

complainant take nothing by his amended bill of complaint against John Daniel, as trustee, and Thomas F. Boyle, Auditor of the City and County of San Francisco, or either of them.

24. In making or entering any decree or order in favor of said Portuguese-American Bank and against complainant Welles.

25. In not entering a decree in favor of complainant Paul I. Welles.

WHEREFORE, complainant, Paul I. Welles, prays that the Order and Decree of said District Court of the United States be corrected and reversed.

C. A. S. FROST,

Attorney for Complainant, Paul I. Welles.

Receipt of a copy of the within Assignment of Errors, on Appeal of Paul I. Welles, complainant, this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN, [226]

Attorneys for John Daniel, Trustee, etc., Defendant.

KNIGHT & HEGGERTY,

JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank, a Corporation, Defendant.

EDWARD F. MORAN,

Attorney for Thomas F. Boyle, Defendant.

Filed Feb. 8, 1913. [227]



[Title of Court and Cause.]

**Consent of Paul I. Welles, Complainant, to Unite  
With John Daniel, Trustee of the Metropolis  
Construction Company, a Corporation, Bank-  
rupt, Defendant, in Appeal.**

COMES NOW Paul I. Welles, complainant in the above-entitled action, and, for answer to the Notice of John Daniel, Trustee, defendant, requiring him to show cause why he should not join in the appeal of said John Daniel, Trustee, defendant, states to the Court that he desires to unite in said appeal and does hereby unite therein with said John Daniel, Trustee as aforesaid; that he has filed herein his Assignment of Errors and Petition for Allowance of Appeal and respectfully prays that the same be now allowed.

Dated, February 8th, 1913.

C. A. S. FROST,

Attorney for Paul I. Welles, Complainant. [228]

Receipt of a copy of within Consent to Unite in Appeal this 8th day of February, 1913, is admitted.

MORRISON, DUNNE & BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and Appellant.

Filed Feb. 8, 1913. [229]

[Title of Court and Cause.]

**Order Granting Appeal, Severing Codefendants and  
Allowing Supersedeas.**

The defendant, John Daniel, Trustee of the Estate of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy arising out of a bankruptcy proceeding now pending in our said court, having heretofore filed herein his Petition for Appeal and his Assignment of Errors, and having given notice to the Portuguese-American Bank of San Francisco, a corporation, defendant, and to Thomas F. Boyle, defendant, and to Paul I. Welles, complainant; and the said Portuguese-American Bank and the said Thomas F. Boyle, defendants, appearing, and said complainant, Paul I. Welles, having appeared and filed herein his Assignment of Errors and Petition and having united with said Trustee in said Appeal, said Appeal is **ALLOWED**; and [230] said Portuguese-American Bank, a corporation, defendant, and said Thomas F. Boyle, defendant, may be made appellees. Said Appeal is to operate as a supersedeas of the Decree appealed from upon complainant giving a bond in the sum of \$1,000.

Dated, February 10th, 1913.

WM. C. VAN FLEET,  
Judge.

Filed Feb. 10, 1913. [231]

[Title of Court and Cause.]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, That we, Paul I. Welles, as principal, and United States Fidelity and Guaranty Company, a corporation, of Maryland, as surety, are held and firmly bound unto Portuguese-American Bank of San Francisco, a corporation, and unto Thomas F. Boyle, in the full and just sum of One Thousand Dollars (\$1,000), to be paid to the said Portuguese-American Bank of San Francisco and to said Thomas F. Boyle, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 13th day of February, in the year of Our Lord One Thousand Nine Hundred and Thirteen.

WHEREAS, lately, at the District Court of the United States for the Northern District of California, in a suit [232] depending in said court, between Paul I. Welles, complainant, and John Daniel, Trustee of the Metropolis Construction Co., a corporation, Bankrupt, Portuguese-American Bank of San Francisco, a corporation, and Thomas F. Boyle, defendants, a decree was rendered against the said Paul I. Welles and also against said John Daniel, as Trustee of said Metropolis Construction Co., a corporation, bankrupt, and the said Paul I. Welles having obtained an Appeal and filed a copy thereof in the Clerk's office of the said Court, to reverse the



decree in the aforesaid suit, and a Citation directed to the said Portuguese-American Bank of San Francisco, a corporation, and the said Thomas F. Boyle, defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in said Circuit on the 10th day of March next.

NOW, the condition of the above obligation is such that if the said Paul I. Welles shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

IN WITNESS WHEREOF, the said Paul I. Welles, as principal, has hereunto subscribed his name and affixed his seal, and the said United States Fidelity and Guaranty Company, a corporation, of Maryland, has caused its name to be hereunto subscribed and its seal hereunto affixed by its attorney in fact thereunto duly authorized the day and year first above written.

PAUL I. WELLES. [Seal]  
Principal.

Witness:

C. A. S. FROST,

To Signature of Paul I. Welles. [233]

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

B. P. OAKFORD,

Its Attorney in Fact.

W. L. ALEXANDER,

Attorney in Fact.

Approved, February 13th, 1913.

[Seal]

WM. C. VAN FLEET,  
Judge.

Filed Feby. 13, 1913. [234]

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[Title of Court and Cause.]

**Citation [on Appeal—Copy].**

To Portuguese-American Bank of San Francisco, a Corporation, Defendant; to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be [235] holden at the City of San Francisco, in the said District, on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord Nineteen Hundred and Thirteen and of the Independence of the United

States of America the One Hundred and Thirty-seventh.

WM. C. VAN FLEET,  
Judge.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a Certified copy thereof with V. L. Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San Francisco, in said District on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,  
U. S Marshal.  
By Elmo Warner,  
Office Deputy. [236]

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San



Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,  
U. S Marshal.

By \_\_\_\_\_,  
Deputy.

Filed Feb. 10, 1913. [237]

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[Title of Court and Cause.]

**Statement of Proceedings and Testimony.**

BE IT REMEMBERED that all of the testimony concerning the [238] alleged assignment of the fourth progress payment on the Fourth and Kentucky Streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the Referee, is as follows, to wit: [239]

**[Testimony of Thomas F. Boyle, for Complainant.]**

THOMAS F. BOYLE, being duly sworn as a witness on behalf of complainant, testified as follows:

**Direct Examination.**

My name is Thomas F. Boyle. I believe I am one of the defendants in this cause, and at present I am the Auditor for the City and County of San Francisco, State of California. I have occupied that office for more than a year last past. [240]

(Original demand for the fourth progress payment on the Fourth and Kentucky Streets job is read in evidence by counsel for complainant as follows:)

(Testimony of Thomas F. Boyle.)

(Written) "KENTUCKY STREET SEWER 1904."

(In red ink.)

(Printed)

PUBLIC BUILDING FUND SERIES 1904.

SEWER CONSTRUCTION ACCOUNT.

DEPARTMENT OF PUBLIC WORKS.

Auditor's No.

10922

\$6830.85

MATERIAL—LABOR.

Treasurer's No.

San Francisco Dec 5, 1910.

"Metropolis Construction Co. Presents this demand on the Treasury of the City and County of San Francisco, for the sum of Six Thousand eight hundred & Thirty 85/100 Dollars, Being for work done; material delivered as per bill attached."

(Attached to the demand, in the form of a bill, is the following:)

"San Francisco, Cal., Dec. 5, 1910.

City and County of S. F.

To Metropolis Construction Co., Inc., Dr.

ENGINEERS AND GENERAL CONTRACTORS.

Telephone Kearny 762

24 California St.

To fourth progressive payment Fourth and Kentucky 6830.85.

Prices and additions correct.

L. L. LEAVY.

Correct—L. E. HAUCK."

(Testimony of Thomas F. Boyle.)

(On the main body of the demand:)

“State of California,  
City and County of San Francisco,—ss.

L. F. Strong being first duly sworn, deposes and says: That he is a duly authorized agent of the party requested to perform the work mentioned in the foregoing demand; that the [241] work therein specified has been actually performed, and the material mentioned has been actually delivered, and the charges made are the proper and true values for the same.

Subscribed and sworn to before me this 5 day of Dec., A. D. 1910.

(Signed) L. F. STRONG.

(Signed) GEO. A. BERGER,  
Asst. Clerk Board of Supervisors.

“The above demand is authorized by Chapters II, III and IV of the Charter of the City and County of San Francisco, approved by the Legislature, January 19, 1899, and by Ordinance No. 477, approved January 20, 1908, providing for the issuance, sale and redemption of bonds of the City and County of San Francisco, in accordance with the result of a Special Election held in the City and County, May 11, 1908, and by Resolution or Ordinance No. 1197 of the Board of Supervisors.

Allowed Jan. 5, 1911.

\_\_\_\_\_,  
City and County Auditor.  
By \_\_\_\_\_,  
Deputy.



(Testimony of Thomas F. Boyle.)

“PUBLIC BUILDING FUND SERIES 1904.  
SEWER CONSTRUCTION ACCOUNT.”

(Endorsed:)

“Auditor’s Receipt No 49123.

“I hereby certify that the labor mentioned in the within account has been actually performed; that the material has been actually received solely for the use of the City and County of San Francisco.

(Signed) MARSDON MANSON. [242]

By HARRIS D. CONNICK.”

“Approved by Board of Public Works in open session.

JOSEPH L. McCORMICK,  
Secretary.”

“Resolution No. 8122.”

(Signed:) “M. CASEY,  
W. A. NEWSOM,  
Commissioners.”

“Bookkeeper’s No. 7981.

“Entered. (Signed:) L. L. LEAVY.

“Approved: (In red ink:) to print Dec. 5, 1910.”

(Signed) “ROBERT J. LOUGHREY.

\_\_\_\_\_,  
Committee Board of Supervisors.

“Received payment \_\_\_\_\_.”

(Also endorsed:)

(Testimony of Thomas F. Boyle.)

SEWER CONSTRUCTION ACCOUNT.

PUBLIC BUILDING FUND 1904.

Treasurer's No.

Auditor's No.

10922.

KENTUCKY ST. SEWER.  
DEPARTMENT OF PUBLIC WORKS CON-  
TRACT.

DEMAND ON THE TREASURY.

By Metropolis Const. Co. Dec. 5, 1910, for \$6830.85.

“In Board of Supervisors” (Rubber stamp erased with pen: “Dec. 12, 1910.”) (Rubber stamp not erased:) “Jan. 3, 1911.”

Referred to Finance Committee.

Approved (Signed:) J. L. Herget, J. McLaughlin.

Approved by Board of Supervisors in open session (Rubber stamp, erased with pen: “Dec. 12, 1910.” Rubber stamp not erased:) Jan. 3, 1911.” “For (in red ink:) \$6830.85.” [243]

(Signed): “John H. Ryan, Asst. Clerk.” (Initials in red ink:) “C. W.”

(Signed:) “W. R. Hagerty Clerk.”

“Approved”: (Rubber stamp scratched out with pencil: “Dec. 13 1910.”) (Rubber stamp not scratched out:) “Jan. 4, 1911.”

(Signed): “P. H. McCarthy, Mayor,”

“Clerk's No. 20840.”

Mr. FROST.—Accompanying this is an estimate dated December 3, 1910, by the city engineer, being the fourth progressive estimate on the Fourth and Kentucky street contract, amounting to \$9,107.80, of

(Testimony of Thomas F. Boyle.)

which the demand in question is 75 per cent. There is a letter attached to it, but I do not offer the letter.

(Witness continuing:) I regard the letter as part of the demand.

Letter referred to read in evidence by counsel for defendant Portuguese-American Bank as follows:

“Fourth & Kentucky Street Sewer, Fourth Payment.”

“December 3d, 1910.

“To the Honorable Board of Public Works of the City and County of San Francisco:

“Gentlemen:

“The following estimate of the value of the labor done and materials incorporated into the work since the last preceding estimate was made for the construction of sewers and appurtenances in Kentucky street and Fourth street has been made to the 1st day of December, 1910.

“This estimate is based upon the amount of work which has been completed in accordance with the plans and specifications and upon the whole amount of money that will become due according [244] to the terms of the contract when the whole of the proposed work shall have been completed.

“This contract was awarded on July 8th, 1910, to the Metropolis Construction Co. for the sum of \$33,182. The estimated value of the labor done and materials incorporated in the work since the last preceding estimate was made is \$9,107.80. Under the terms of contract, the contractor, the Metropolis Construction Co. is entitled to the payment of an amount



(Testimony of Thomas F. Boyle.)

equal to 75 per cent of the above estimate, or to \$6830.85.

“A summary of the value of the labor done and materials incorporated into the work since the contractor began the performance of his contract and the progress payments previously recommended follows:—

Total estimated value of work completed

December 1, 1910.....\$28,609.05

75 per cent of total estimated value..... 21,456.79

Total progress payments previously re-

commended..... 14,625.94

Balance due contractor..... 6,830.85

Respectfully submitted,

MARSDON MANSON,

City Engineer.”

(Initialed) L. E. H/J.” [245]

I have with me the original demand for the fourth progress payment on the Fourth and Kentucky Streets job. (Producing.) That is the paper that I have in my hand now. That is a demand for the fourth progress payment on the Fourth and Kentucky Street contract between the Metropolis Construction Company and the City and County of San Francisco.

I am familiar with the signatures that appear upon that demand and on the letter that has just been read. As Auditor of the City and County of San Francisco, I have seen the signatures of those persons many times. They are the signatures of the persons whose names are signed to the document, the

(Testimony of Thomas F. Boyle.)

Mayor and members of the Board of Supervisors and others. I received that document on January 5, 1911. It came to us from the Board of Supervisors and has been in my possession ever since, that is, I have had that paper ever since—I have had this demand ever since that day. Since that day there has been one other demand passed through my office as Auditor on this Fourth and Kentucky Streets contract. That was the fifth and final payment; I did not make a record of the amount. I could not say whether or not it was \$11,049.64; I have not got a memorandum of it; anyway, it was the fifth and final payment on this contract. That was after the contract was accepted. It came through the usual [246] way. It was passed by all these different members of the committees in the usual way, from the Board of Supervisors. That was after the contract was accepted in the usual course of business. John Daniel, as receiver and trustee of the Metropolis Construction Co. got the demand. At the time I gave that demand to Mr. Daniel, there were no claims against it—there were some but those who held them consented to release the demand and to turn the demand over to Mr. Daniel, the trustee. So far as the City is concerned, there are not any claims now against this demand—against the fourth progress payment. As far as the City is concerned, that is, the Board of Supervisors, the Board of Public Works and the Mayor, they are through with it. They have no further interest in the Fourth and Kentucky Streets contract that I know of, other than

(Testimony of Thomas F. Boyle.)

—that the Board of Supervisors usually, where there are protests against payments, they also notify the Auditor of those protests. Those come in the usual course of business. But there has been nothing of that kind on behalf of the City itself or any officer of the City; and I personally don't claim any interest in the demand, that is, this particular fourth progress payment now. I said that we made the fifth payment to John Daniel, Trustee. I am familiar with these bankruptcy proceedings, that is, I have been advised that Mr. Daniel is the trustee of the estate of the Metropolis Construction Co. I have paid money over to him in due progress of business. As a matter of fact, I have been directed by the City to pay the money over to whomever is entitled to it, and on its face that is the Metropolis Construction Co. I have acted merely in the position of stakeholder. If it had not been for the fact that I feared [247] that I might incur some responsibility myself if I paid this money over to John Daniel, Trustee, I would do so. That is the only reason why I don't do it. The Portuguese-American Bank has made claim upon me and I feel that if I turn that warrant over in accordance with the demand of the trustee of the estate of the bankrupt, I might possibly incur some personal liability to the Portuguese-American Bank—there are some claims against this demand and until it is all straightened out, I am going to hold it to protect myself.



**[Testimony of Chris Emille, for Defendant Portuguese-American Bank.]**

CHRIS EMILLE, being duly sworn, as a witness on behalf of defendant Portuguese-American Bank, testified as follows:

Direct Testimony.

On December 6, 1910, and for the year prior thereto, I was president and general manager of the Metropolis Construction Company. On December 5, 1910, I went to the Portuguese-American Bank of San Francisco to make a loan of \$30,000, and while there made the loan. On December 5, 1910, I brought the letter you (Counsel for Defendant Portuguese-American Bank) now hand me, addressed to Thomas F. Boyle, to the Portuguese-American Bank. When I got there, I think I first saw Mr. De Figueiredo. Then I tried to get \$30,000 on an assignment for money that we had due us from the City of \$30,000. I asked Mr. De Figueiredo to adopt the assignment of money of the Metropolis Construction Co. due with the City for work performed by the Metropolis Construction Company. We had this money coming to us from the City and we wanted to get that assignment to the Portuguese-American Bank so that we could use that money. I told Mr. De Figueiredo that we had so and so much money coming to us [248] from the City—\$38,000 either more or less—coming to the Metropolis Construction Co. for work performed for the City. At that time our Company was doing three jobs for the City—the Sunset, the Seventh Street, and the Fourth and

(Testimony of Chris Emille.)

Kentucky. We were putting in sewers. There was money due us on these particular jobs—around \$38,000. I know that on December 5, 1910, money was due the Metropolis Construction Company.

Counsel for defendant Portuguese-American Bank offered and read in evidence the letter or order addressed to Thomas F. Boyle that witness testified he brought to the Bank on December 5th, 1910. It is as follows:

“San Francisco, December 5, 1910.

“Thomas F. Boyle, Auditor of the City and County of San Francisco.

“Dear Sir: You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against the City and County for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

“First: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract dated January 5, 1910, for Kentucky and Fourth street sewers; the contract being between the undersigned and said City and County, new bond issue of 1903.

“Second: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated March 25, 1910, for lower Sunset District Sewer and being contract No. 36. [249]

(Testimony of Chris Emille.)

“Third: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the undersigned and said City and County, and dated June 22, 1910, and being for the construction of sewer in Seventh street, Howard and Hubbell street under contract No. 31.

METROPOLIS CONSTRUCTION CO., INC.

By CHRIS EMILLE,

President.

By L. F. STRONG,

Asst. Secretary.”

(Seal of the Metropolis Construction Co. attached.)

(Marked:) “Received Auditor’s Office December 6, 1910. H. J. and L. F. Strong.”

I signed that paper. I know that signature; it is Mr. Strong’s. He is Assistant Secretary. The seal on it is the seal of the Metropolis Construction Co. I asked Mr. De Figueiredo to accept that assignment and let us have the money. I asked to borrow money from the Bank—\$30,000. Mr. De Figueiredo would not accept this except the Auditor accepted it, received it, you know, and that—I offered an assignment of that money that was coming to the Metropolis Construction Co. from the City according to these three resolutions. That paper I offered to turn over as security—that paper that I have just read to the court a few moments ago. At the time I offered that assignment as security, Mr. De Figueiredo told me to get that paper received by the Auditor; to go to the Auditor to get it stamped. Then I went to the Auditor’s office and



(Testimony of Chris Emille.)

got this. He put this seal on it; he put this rubber stamp on it. I brought that paper back to the Bank—the same paper that the Auditor stamped—and turned it over to Mr. De Figueiredo and got that loan of \$30,000 on this assignment. Mr. [250] De Figueiredo is present here; there is the gentleman right there (indicating). I know that he has official connection with the Portuguese-American Bank of San Francisco. When I brought this assignment and gave it to Mr. De Figueiredo we got that amount of money, \$30,000.

(Counsel for defendant Portuguese-American Bank shows witness a paper—Note of the Metropolis Construction Co. to Portuguese-American Bank—purporting to be signed by J. A. Baptista, Secretary, and Chris Emille, President, and having the seal of the Metropolis Construction Co. attached.)

That is my signature. The other signature is Mr. Baptista's. The seal is the seal of the Metropolis Construction Co. On December 6, 1910, when I turned over that order of the Auditor that was just read in evidence, I gave Mr. De Figueiredo as further security, this note. Mr. Baptista was Acting Vice-President of our Company. I think he should put "Vice-President." He was not the Secretary of the Metropolis Construction Company; but he had the right to sign all checks and so forth.

Counsel for defendant Portuguese-American Bank offered and read in evidence the note identified by witness, of which the following is a copy:

(Testimony of Chris Emille.)

“San Francisco, Cal., December 6, 1910.

“No. S-122.

“\$30,000.

“On demand, at three o'clock p. m. of that day, no grace, for value received, in gold coin of the government of the United States, the Metropolis Construction Company, a corporation, promises to pay to the order of Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, thirty thousand dollars, with interest from date at the rate of seven per cent per [251] annum until paid, payable *monthly*. Both principal and interest payable in like gold coin.

“In testimony whereof the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by a resolution of the Board of Directors of said corporation, duly adopted by a majority of said board at a meeting of the said board duly called and held.

“METROPOLIS CONSTRUCTION CO., INC.

“By J. A. BAPTISTA,

“Secretary.

“By CHRIS EMILLE,

“President.”

(Seal of the Metropolis Construction Co. attached.)

At the time I delivered the assignment that was read in evidence, I delivered to Mr. De Figueiredo those resolutions that are hereto attached and the note that was just read in evidence—the note for

(Testimony of Chris Emille.)

\$30,000. I gave these very papers to Mr. De Figueiredo at that time.

Counsel for defendant Portuguese-American Bank offered in evidence the resolutions referred to, which were received without objection and marked respectively as follows:

Defendant Portuguese-American Bank's Exhibit No. 1. Resolution adopted by the Board of Public Works, showing the allowance of \$6,830.85 as the fourth progress payment on the contract for the construction of sewers in Kentucky and Fourth streets in favor of the Metropolis Construction Co. [252]

Defendant Portuguese-American Bank's Exhibit No. 2. Resolution adopted by the Board of Public Works, showing the allowance of \$19,167.20 to the Metropolis Construction Co. for sewers in Seventh Street.

Defendant Portuguese-American Bank's Exhibit No. 3. Resolution adopted by the Board of Public Works, showing the allowance of \$12,173.17 to the Metropolis Construction Co. for sewers in Lower Sunset District.

CHRIS EMILLE, recalled as witness for defendant Portuguese-American Bank, being duly sworn, testified as follows:

On or about December 7th—that is the day after I testified I was at the Portuguese-American Bank and turned over the assignment to the Bank as security for a loan of \$30,000. I called at the Bank again. On that day I borrowed \$5,000 more on the same assignment. I saw Mr. De Figueiredo and asked



(Testimony of Chris Emille.)

him to have the Bank give me \$5,000 more on the same assignment. He told me to go and see the president of the bank. Then I went in there to see the president of the Bank, and asked him the same question—to have the bank give me \$5,000 more on the same assignment. He first found a little objection to it, and afterward I got it. He allowed me \$5,000 more on the same assignment. Then a note was presented for me to sign.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note that was presented to me to sign. I signed that note. This is my signature. The seal is the seal of the Metropolis Construction Co.

Note identified by witness read in evidence by counsel for [253] defendant bank, as follows:

“\$5,000. San Francisco, Cal., December 7, 1910.

“On demand, at 3 o'clock P. M. of that day, no grace, for value received, in gold coin of the government of the United States, Metropolis Construction Company, a corporation, promises to pay to the order of the Portuguese-American Bank, at the Portuguese-American Bank of San Francisco, in this city, Five Thousand and 00/100 Dollars, with interest from date at the rate of seven per cent per annum until paid, payable monthly. Both principal and interest payable in like gold coin.

“In testimony whereof, the said corporation has caused its corporate name to be hereunto signed by its president, and its corporate seal to be hereunto

(Testimony of Chris Emille.)

affixed by its secretary, said president and secretary having been hereunto expressly and specifically directed by resolution of the Board of Directors of the said corporation, duly adopted by a majority of the said Board, at a meeting of the said Board duly called and held.

(Signed)      “METROPOLIS CONSTRUCTION  
CO.

“By J. A. BAPTISTA,

“Asst. Treas.

“By CHRIS EMILLE,

“President.”

(Seal of the Metropolis Construction Co. attached.)

The Metropolis Construction Co. gave as security for this note or with this note the same assignment as the \$38,000 held by the City Treasurer. That is the same \$38,000 held by the City Treasurer, the Auditor. That was the \$38,000 that had been assigned to the Bank before. I've been told that none of those loans has been repaid by the Metropolis Construction Co. I believe they have not been paid—I know they have not been paid. The Metropolis Construction Co. had one contract with the City and County of San Francisco for the construction of sewers on [254] Kentucky and Fourth Streets. This is the assignment (indicating) that was read in evidence. The contract that is mentioned in this is the only contract that we had with the City for the construction of sewers on Fourth and Kentucky Streets. This is referring to a paper I call an assignment which was read in evidence. At the time I

(Testimony of Chris Emille.)

turned it over to the Bank my understanding as to its nature was that it was an assignment for them to draw the money from the City Treasury.

**[Testimony of L. F. Strong, for Defendant.]**

L. F. STRONG, recalled as a witness on behalf of defendant Portuguese-American Bank of San Francisco, a corporation, being duly sworn, testified as follows:

Direct Examination.

I called at the Portuguese-American Bank of San Francisco on December 6, 1910—I believe that was the date. I went in with Mr. Emille and I saw Mr. De Figueiredo, and I stayed outside of the counter. Mr. De Figueiredo was inside the enclosure there. I believe at the receiving window. Mr. Emille was carrying on a conversation with him; then Mr. Emille went inside with Mr. Freitas. Mr. Emille was carrying on the conversation with Mr. De Figueiredo in my presence. I forget the exact words of the conversation but Mr. Emille was asking for an additional loan of \$5,000 on that assignment—the assignments of the City vouchers, amounting to \$38,000. I believe I was at the Bank once before this when they were arranging the details of making the assignments to the bank. I don't recollect exactly what was said on that day because I don't believe I heard the conversation. It was just merely arranging for the details of having those assignments made—the same assignments that they had before. I [255] didn't hear the conversation.

(Counsel for defendant Portuguese-American



(Testimony of L. F. Strong.)

Bank shows witness the letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese-American Bank, already read in evidence.)

The signature now shown me is my signature. I saw that on the date it bears, December 6th, 1910. I took it to the Auditor's office on December 6th. The seal shown me is the seal of the Metropolis Construction Co. The signature now shown me is the signature of Chris Emille, President of the Metropolis Construction Co. I believe Mr. Baptista came and took the paper to the Portuguese-American Bank. When we were at the Auditor's office, we filed one of these assignments, and had the Auditor stamp the other one as received. I was present with Mr. Emille when a loan of \$30,000 was asked of the Portuguese-American Bank by the Metropolis Construction Co.—at one of the times when he was arranging to make these assignments. I believe I was present both times when loans were requested. I don't believe the sum was \$30,000. I was with the Portuguese-American Bank in relation to the assignment of the particular warrants mentioned in that assignment. At that particular time, \$30,000 was requested. Mr. Emille asked the officials of the Portuguese-American Bank for this loan. It was asked at the time I was there. I don't believe that I heard the conversation, but I knew that that was what he was applying for at that time. I knew he was applying for it at that time because I had arranged the

(Testimony of L. F. Strong.)

details before that, as to the amount we were going to borrow. I heard conversations between Mr. De Figueiredo and Mr. Emille. Mr. Emille asked Mr. De Figueiredo for a further loan of \$5,000 on the assignments that he had already borrowed \$30,000 on. I [256] know that the loan of \$5,000 was made on the occasion that I have just mentioned. I know that the Metropolis Construction Co. gave a note to the Portuguese-American Bank for the sum of \$5,000 on that occasion. I saw Mr. Emille sign the note that was given.

(Counsel for defendant Portuguese-American Bank shows witness a note.)

I believe the note shown me is the note to which I refer. That signature shown me is Mr. Baptista's. I believe he is the Assistant Treasurer and Vice-President of the Metropolis Construction Co. The signature now shown me is Chris Emille's. The signature now shown me is the signature of the Metropolis Construction Co. The loan was made at the time that note was dated. I know that a resolution was passed by the Metropolis Construction Co. about January of 1910, empowering Mr. Emille to take full and exclusive charge and management of the affairs of the Metropolis Construction Co., and also giving him power to borrow money, and appointing him general manager. I was present at the meeting at which that resolution was passed. At that meeting, I was acting in the capacity of assistant secretary. At that time and subsequently during the year 1910 I was doing the duties of secretary of the Me-



(Testimony of L. F. Strong.)

Metropolis Construction Co. Mrs. Emille, the regular secretary, was not active during the year 1910 as secretary of the Company. I performed the actual duties of secretary of the Metropolis Construction Co. subsequent to **January 1, 1910**, and during the year 1910. I know that about the time of that meeting, a resolution prepared by Mr. Cochran, the attorney for the Company, was read or was introduced at the meeting that [257] I have just testified to. I do not know where that resolution is now. I do not know where the minute-book of the Metropolis Construction Co. is. I read the original resolution.

Cross-examination.

I acted as secretary of the Company. Mrs. Emille did not do the active duties of secretary. I don't believe I ever saw an actual minute-book of the corporation. I don't recollect of ever having seen the minute-book of that corporation. I saw the resolution I mentioned at the meeting. I believe I had it and Mr. Emille had it. It was typewritten on white paper. I believe it was filed away. Those different resolutions were kept at different places at different times. I don't know the exact location where this was filed. It was filed with the rest of the papers in Mr. Emille's desk, I think. I read it over myself. I have seen it since—the original resolution. I had several copies drawn at different times for different people's information. I did not make them myself—I ordered them made. I saw the original and read it over.



(Testimony of L. F. Strong.)

Redirect Examination.

The substance of the resolution was that Mr. Emille was appointed general manager of the Metropolis Construction Co., to bind it in any form that he might see fit; to borrow money, to make contracts; he was in the sole charge of all employees. That was according to that resolution under the action of the general manager; he was to have full power in regard to employees. My recollection is pretty good [258] about that. I had it come up several times, and I don't need to have it refreshed in any way. I could not say that all the wording is exactly the same, but the paper now shown me is a similar copy to the copy of the resolution that was adopted at the meeting I just referred to. It is substantially what was in that resolution. The resolution that I adopted was the same resolution that was received from Mr. Cochran about that time. I should judge it would be the secretary's duties to keep the minutes of the corporation. I do not know of the secretary, Mrs. Emmille, ever keeping any minutes of the corporation. I don't know of her ever taking any active interest in the duties of her office as secretary; as director, yes. Mr. Emille handled the resolutions that were adopted at the meetings. Resolutions were generally drawn up by Mr. Cochran, our attorney. I never saw Mr. Cochran write up any of the resolutions in any book kept by the corporation for the purpose of entering any minutes of the Board of Directors. At the time the meeting would be held, there would be

(Testimony of L. F. Strong.)

some notations or papers drawn up and filed away. I believe they were filed in a folder. Mr. Emille kept them. As far as I know, that is what the minutes consisted of, the folder. I did not attend all the meetings. At the meetings I attended, I made some notes. I gave them to Mr. Emille. He kept those together in his own desk. The directors at the time of this meeting were Mr. Chris. Emille, Mr. Alfred Reinicke and Mrs Chris Emille. Mr. Emille and Mr. Reinicke and I were present at this meeting when this resolution was adopted. [259]

#### Recross-examination.

Mr. Baptista's office was Vice-President and Assistant Treasurer. He had no other office to my knowledge. I held the office of Assistant Secretary all the time from about January, 1910, to about January, 1911, and exercised the duties of it all that time. Mr. Baptista was drawing checks and checking the accounts—all payable accounts of the Metropolis Construction Co. as to whether they were correct or not. He was there to take charge of the bookkeeping and for making the pay-rolls, and to see that the business went along in correct form; as a matter of fact, to see whether it was correctly done. I don't know what became of the folder in which these papers or notations of the minutes were kept. Some of the notations were typewriting and some of them were pencil, I suppose, or ink; various. As a matter of fact, the minutes of the meetings or of any one meeting might consist of several different papers. We drew up at several of the meetings



(Testimony of L. F. Strong.)

several resolutions tending along the lines of buying materials that were important.

Redirect Examination.

The duties of the different officers were not very clearly defined in that corporation. The resolution that I say was adopted was never revoked or cancelled. I believe there were by-laws before my time; I don't believe I ever read them; I think I did see them once.

Counsel for defendant Bank offered and there was admitted in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 4," a copy of a resolution passed by the directors of the Metropolis Construction Company in January, 1910, conferring [260] upon Chris Emille, the president of the company, the powers of General Manager of the Company with full and exclusive charge of the management and conduct of the affairs of the Company with full power to borrow money and to do and perform such things as may be necessary from time to time to carry on and conduct the affairs of the Company.

**[Testimony of M. T. Freitas, for Defendant.]**

M. T. FREITAS, recalled as a witness on behalf of Portuguese-American Bank of San Francisco, corporation, defendant, being duly sworn, testified as follows:

Direct Examination.

My name is M. T. Freitas. I live at San Rafael. My nationality is Portuguese. I was born in St. George Island, one of the Azores Islands. I was



(Testimony of M. T. Freitas.)

President of the Portuguese-American Bank of San Francisco during the year 1910. I was President of the Bank on December 5th and 6th when Mr. Emille came down there to see me about that time. I saw Mr. Emille on December 5th, 1910, at the office of the Bank in this City and County. Mr. Emille came in to see Mr. De Figueiredo, our cashier, to negotiate a loan. He wanted to negotiate a loan of \$30,000, and I asked him what collateral he had to put up for that loan. He then showed me an order on the Auditor for \$38,000 and the notice only being written out, and I told him I didn't think it was in proper condition to go through; that he ought to take it before the Auditor and have him acknowledge receipt before he could make the assignment. Then he said that he would go up and have it properly attended to.

(Counsel for defendant Portuguese-American Bank shows witness paper already introduced in evidence, being letter addressed to Thomas F. Boyle, Auditor of the City and County of San Francisco, which Mr. Emille testified he left with the Portuguese- [261] American Bank.)

That is the paper that Mr. Emille brought to me on that occasion in order to assign his collateral. This stamp or this receiving part of it was not on at the time—this Auditor's receipt; that stamp. I wanted him to get a proper notice given to the Auditor before I took the assignment and loaned the \$30,000—let the \$30,000 go. He called on me later, but I don't recollect whether exactly the same

(Testimony of M. T. Freitas.)

day or the next day. I would not say positively; but when he saw me the next time he presented the document as it is now and I had Mr. De Figueiredo, the cashier, have him sign the note for the corporation—have the corporation give a note for the \$30,000 and take care of the assignment for that amount, for \$38,000. He offered this paper, said he was going to make an assignment of this. He said that the Company required \$30,000 and that they offered this document, this notice from the Board of Public Works for \$38,000, as security for \$30,000 and the Company to make an assignment for that amount. Mr. Emille presented those papers to me at that same time—the papers introduced in evidence as defendant Portuguese-American Bank's Exhibits 1, 2 and 3. The loan of \$30,000 and the presentation of these papers to me took place at the same time. They were one transaction. I saw the note that was given on that occasion. The note that has just been introduced in evidence is the note that was given on that occasion,—at the same time, before the money was delivered. I saw Mr. Emille on December 7th at the Bank. On that occasion he wanted \$5,000 more on that same assignment that he had made the day previous, because he needed money to pay the labor, and [262] it would be quite an accommodation to the Metropolis Construction Co. to let him have \$5,000 as he wanted to pay off the labor. Regarding security, he said that we had that security of \$38,000, and there was only \$30,000 that we had allowed on that assignment.



(Testimony of M. T. Freitas.)

of \$38,000. Then I told Mr. De Figueiredo to let him have the sum of \$5,000 on that same assignment, and take a new note, a second note. I have seen that note lots of times. That note of \$5,000 dated December 7, which was read in evidence is the note that was given to me on that occasion—given to the Bank—to the cashier. About December 9th or 10th I requested you (referring to James B. Feehan, counsel for defendant Bank) to represent the Bank in reference to the Bank's notes against the Metropolis Construction Co. and this assignment—to take charge of the legal part of the collection of those notes. I authorized you to do everything that was necessary. You were attorney for the Bank and were to take full charge of those notes and have them paid in to the Bank. You were our attorney during all the year 1910. At the time that these notes were taken, I, as President of the Bank, had received no notice that the Metropolis Construction Co. was involved in any way, or that its credit was impaired and that insolvency or receivership proceedings were contemplated by it or against it—at that time. I had no reason to believe that this assignment would create a preference in favor of this Bank. At that time there was no money due to the Bank. I think this Company had been doing business with the Bank about three or four years. They did a very large business with us; they used to borrow quite often and put up collateral. These two loans of \$30,000 and \$5,000 on December 6th and 7th, 1910, were made in the usual course of [263]



(Testimony of M. T. Freitas.)

the Bank's business. I thought that the reputation of the Metropolis Construction Co., as to its financial condition, on December 6th and December 7th, was A-1. At all times subsequent to December 6th, I have claimed to be the owner and entitled, as president of the Bank, to the possession of the warrant mentioned in that assignment.

Cross-examination.

I think that we have been lending them money for four years, I won't say positively; about that—three or four years. I don't know if it is the same corporation; it used to be a partnership, I think, I am not positive. Mr. Emille was interested and someone else, I have forgotten. That is away back about 1906. That was the time of the earthquake. We made loans right along for two years previous to December 10th. This was the second assignment that we had had. We had had one about a month previous of about \$20,000. I am not positive as to the amount. I know we had the same kind of an assignment. As collateral, they would put up bonds, commercial bonds and other bonds—different kinds of collateral. I am not positive whether or not they gave an assignment by resolution. Our cashier made it. I think about a month or so previous to that, that we had an assignment of \$20,000. But we always had a notice of resolution authorizing the Board of Directors or Mr. Emille to borrow money from the Bank, or else he would not have got it. The copy of that notice was shown to us. I am not positive if we got it now or not. I know I saw it.

(Testimony of M. T. Freitas.)

I don't know as I looked for it. My attorney did not ask me to look for it. We loaned the corporation \$5,000, on, I think, December 7th; I am almost sure it was December 7th; [264] it is a good many months ago. I could not tell you whether or not it was on December 10th, Saturday, three days afterwards, that this corporation went into the State Court and confessed its insolvency. I heard somebody—I could not tell whether it was December 10th or 20th. I remember that it was done; I would not say the date. I knew the date, but I could not tell what date it was. I don't know whether or not I knew it on that date. I was sick in bed. I fell sick in December. I was taken sick, I think, about the 9th or 10th of December. The meeting of the Board of Directors of the Portuguese-American Bank is on the second Saturday of each month. I was there; that was the last time I was there; I was sick for quite a while. I don't know whether or not I knew about it on that day. I did not become anxious about the condition of the Metropolis Construction Co. before that nor immediately after we made that last loan of \$5,000. I never became anxious about it because I considered them A-1 and had no reason to question their solvency at that time. I authorized Mr. Feehan (counsel for the Portuguese-American Bank) to prosecute our claims and to collect the notes when they were due. It could not be on the 9th; on the 9th I didn't know anything about it. It was not on the 10th—the day of the meeting of the Board of Directors that I attended;



(Testimony of M. T. Freitas.)

I don't know what date it was. I did not show him the resolutions passed by the Board of Public Works at the time we let him have this last \$5,000. That was away back. But this resolution of the Board of Public Works; this was on the 6th. That was before he got the \$30,000. He got the \$30,000 on either the 6th or 7th; I could not [265] say positively. At the time he got the money and showed me these resolutions from the Board of Public Works that I have testified to. They were to be paid on the 13th, I believe. I think it was something like that; because the Board of Supervisors would meet on the following Monday. But I had the assignment and we were protected to the extent of our interest. I could not tell you positively whether or not it was the 13th that they were to be paid on; it is so far back; I could not tell you the date. I could not tell exactly when I gave Mr. Feehan his authority; I can't remember.

Redirect Examination.

After the meeting of the directors on December 10th, I remember meeting Mr. Feehan in front of the vault of the Bank and saying something to him about this case—about the testimony taken, but I could not remember now what Mr. Feehan said. I know I was not feeling well and I had to go home, and I think Mr. De Figueiredo was going to place the matters with Mr. Feehan, because as soon as I got through the meeting I had to go home; but I spoke to Mr. Feehan for just a short while. I remember that it was a day at the bank, and I was not feeling very



(Testimony of M. T. Freitas.)

well, and I told Mr. Feehan to see Mr. De Figueiredo. He was the cashier and had the proper authority to instruct Mr. Feehan what to do. I was not in a condition to transact business when I got through with that meeting. I don't know whether or not it was on that day that I was notified that the Metropolis Construction Co. was in difficulties; I don't remember exactly. My condition was so that I had to resign the management of the Bank, because I was very nervous, and have been for years, and I [266] resigned the management of the Bank on that account. I was not competent to take full charge of the management. I think I notified Mr. Feehan that I saw the resolution of the Metropolis Construction Co. authorizing Mr. Emille to borrow money, but I am not positive. I don't know if such resolutions are in the files of the Bank; I don't think they are.

**[Testimony of V. L. De Figueiredo, for Defendant.]**

V. L. DE FIGUEIREDO, being duly sworn as a witness on behalf of defendant Portuguese-American Bank, a corporation, testified as follows:

**Direct Examination.**

I reside in this City and County. I was born in Portugal. I was cashier and secretary of the Portuguese-American Bank during the year 1910, including December 5th, 6th and 7th, 1910, and have held those offices at all times since then. I hold them now. I know Messrs. Emille and Strong, who appeared here, as officers of the Metropolis Construction Co. I saw Mr. Chris Emille and Mr. Strong on December 5th, 1910. They came up to the Bank to bor-

(Testimony of V. L. De Figueiredo.)

row \$30,000 and offered as security an order on the treasurer of the City and County of San Francisco for warrants amounting to \$38,100.16, or about that. I took the matter up with the president that day, and this assignment that was given—that they were offering to us—had not been accepted by the Auditor, so that I told them to have the Auditor accept it first, before we would deliver this money. On the following day then they came in with the order already accepted by the Auditor and we gave them the \$30,000, and got their note for it. [267]

(Counsel for defendant Portuguese-American Bank shows witness an order on the Auditor, dated December 5, 1910.)

I have seen that before; I saw it on December 5th and December 6th. I saw it at the Bank. Mr. Emille brought it in. That is the order that I said I wanted to have accepted by the Auditor, so it would be some sort of collateral for the note—for the \$30,000. Otherwise, without this acceptance, we would not consider it as collateral. There were other papers shown me about that time. There was a copy of the resolutions, of three resolutions passed by the Board of Public Works. Those are the resolutions that have already been introduced in evidence. They were attached to this assignment when it was delivered to the Bank on December 6th. Mr. Emille stated that this paper—the order on the Auditor—was a complete assignment of the full amount of the three warrants—the warrants that are described in those resolutions, that is, the moneys



(Testimony of V. L. De Figueiredo.)

due on them are described in those resolutions.

(The *assignment and not* referred to have been already read in evidence. The resolutions are marked “Defendant Portuguese-American Bank Exhibits 1, 2 and 3.”)

At that time, I took a note for \$30,000 from the Metropolis Construction Co. The note now shown me, of \$30,000, dated December 6th, is the note. This note was given to me at the time this assignment and the resolutions were given—on the second day—on the 6th. They are all under one transaction; in fact, they were all held together at the Bank. This was held for collateral for that note. When I received these papers, I just pinned them together to the note. I gave the Metropolis Construction Co. a credit [268] for \$30,000 right after they signed the note.

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag showing a deposit in the Portuguese-American Bank of San Francisco, on December 6th, 1910, by the Metropolis Construction Co., of \$30,000.)

I saw the tag before; I saw it on the 6th of December, 1910. I made it out myself. The tag was made out at the time I received those papers from the Metropolis Construction Co.—right after the note was signed. This \$30,000 that was placed to the credit of the Metropolis Construction Co. was all paid out in different checks. They were paid on the 6th and on the 7th—part were paid on the 7th. They were all used by the Metropolis Construction Co. On December 7th I saw Mr. Emille again. He came into



(Testimony of V. L. De Figueiredo.)

the Bank on December 7th, having used all this money, and he asked for a further credit of \$5,000, stating that as we had a warrant for \$38,000, we were sufficiently warranted to give them \$5,000 more. So I took the matter up with the President of the Bank and we gave them a credit of \$5,000 more, on the 7th of December, 1910, upon their signing another note for that amount, and using the same order on the Auditor, and the collateral for this extra \$5,000.

(Counsel for defendant Portuguese-American Bank shows witness a note for \$5,000, dated December 7, 1910.)

That is the note. I received it on December 7th—a note signed by Mr. Emille. In fact, I wrote the note out myself and he signed it.

(The note, signed by the Metropolis Construction Co. by J. A. Baptista, assistant treasurer, by Chris Emille, [269] President, with the corporate seal of the Metropolis Construction Co., has already been read in evidence.)

(Counsel for defendant Portuguese-American Bank shows witness a deposit tag, showing a deposit in the Portuguese-American Bank on December 7th, 1910, by the Metropolis Construction Co., of \$5,000.)

That was made out by the receiving teller, Mr. Joseph. The \$5,000 that I loaned the Metropolis Construction Co. was also paid out on checks. It was placed to their credit. This shows that it was placed to their credit. That was all drawn out by checks by the Metropolis Construction Company.

(Testimony of V. L. De Figueiredo.)

To the best of my recollection, the Metropolis Construction Company, as a corporation, had been doing business with our Bank since November, 1908—November or December of 1908. I am not positive. I could tell by a memorandum here. (After referring.) —1908. I could not tell right off what was the volume of business during the year 1910, of the Metropolis Construction Co. with our Bank. I have got some memorandums that I could tell from. Well, they varied from one month to another. Some months they were doing \$50,000 of business and some months over \$100,000. I have a memorandum here showing just how much they were doing each month. In the month of August, 1910, they deposited with us \$40,250; in the month of September, 1910, \$27,218.88; in the month of October, \$68,424.40; in the month of November, \$184,650.34. In the seven days of December, \$55,729.40. That is actual figures taken from the record. No part of the \$35,000 that was loaned on this assignment on December 6 and December 7 was ever repaid. There is now due from the Metropolis Construction Co. to the Portuguese-American [270] Bank \$35,000, plus interest, which amounts up to date to \$1,714 interest. There was a slight balance to the credit of the Metropolis Construction Co.—\$1.06. The Bank claimed to be the owner of these warrants and the money represented thereby at all times subsequent to December 6, 1910. On December 6th and also on December 7th we had no knowledge or information or belief whatever that the Metropolis Construction Co. was not a



(Testimony of V. L. De Figueiredo.)

solvent corporation. I had no reason to believe that this assignment would effect a preference in favor of our Bank as against other creditors. I know the reputation of the Metropolis Construction Co. financially, on the 6th of December; it was good. I was present at a meeting between Mr. Freitas and Mr. Feehan; but I don't recollect whether or not it was on December 9th. I was present at the time that we took that matter up, when we found out by the newspapers that the Company was in trouble. To the best of my recollection, that was on Saturday when I found it out, which was on the 9th, I think. I requested you to take action with regard to this matter. I don't know whether or not Mr. Freitas did, but I know I requested you. I requested you to do all that was for the interest of the Bank, all that was necessary for the interest of the Bank, to collect those notes. With regard to the assignment, I requested you to advise the auditor, and I don't remember who else, but the Board of Supervisors, I think, and the Board of Public Works, that we were the owners of such warrants. The only information I got at that time was the Metropolis Construction Co. was in trouble was received from the newspapers, on the 9th. Those loans were made in the regular [271] course of business at our Bank. These notes that were used are on the regular forms that we have at the Bank. Mr. Joseph Baptista left the employ of the Portuguese-American Bank on the last day of October, 1910. After that date, he had no official position or employment whatever with the Portu-



(Testimony of V. L. De Figueiredo.)

guese Bank. He never received any pay from the Bank after that. Mr. Baptista presented his resignation to the Board of Directors at the meeting of September 10. The resignation was accepted at that very meeting. I heard Mr. Freitas testify that he saw a resolution of the Metropolis Construction Co. in relation to Mr. Emille. There is no such resolution at the bank. We have no such resolution on file. If such a resolution were on file, it would be in my possession. There is no such resolution at the bank. I never heard until to-day that Mr. Freitas saw such a resolution.

Cross-examination.

When Mr. Emille came there on December 5th, Mr. Strong was right there with Mr. Emille. Mr. Emille did all the talking with me, and as I have related, there was talk about a loan of \$30,000 and the collateral for it. I wanted the collateral—this order on the City Auditor which has been introduced in evidence and which I have identified—accepted by the Auditor before I regarded it as sufficient upon which to make them a loan. And Mr. Emille in some way he got this stamp on from the Auditor's office—"Received Auditor's Office December 6, 1910"—and brought it back to me, and thereupon they gave us a note for \$30,000. I had some talk with the president of the bank about that—just us three—Mr. Emille, and the president [272] and myself. We had made previous loans under similar circumstances. On the 16th of November, we made a loan in the same manner. I had talked with nobody about

(Testimony of V. L. De Figueiredo.)

that first loan and the kind of security we were to receive except with the president and Mr. Emille. The president, Mr. Emille and I, on behalf of the company, arranged the loan.

I have lived in San Francisco about nineteen years. I am a citizen of the United States and of San Francisco, and a voter here. I am familiar with the manner in which the government of the City is carried on. At the time we loaned the money on those warrants, I thought they had been passed upon on that Monday, on the 5th, by the Board of Supervisors. I knew that the resolutions that were handed me were of the Board of Public Works, but I thought they were approved that day by the Supervisors. I did not make any investigation to find out until afterward, I guess. As a matter of fact, I don't think the approval of the supervisors is necessary. I knew that the warrant had to be approved by the Board of Supervisors before it could be paid. I hadn't had any trouble before that. We had got our money before that and had had no trouble. I anticipated that this thing would go right through; as a matter of fact, it was on its way then; that was my idea. I had no other paper on this particular loan from the Metropolis Construction Co. outside of the note and this assignment; I consider the resolutions and the assignment all one. I thought that was all one transaction. They were all pinned together. With regard to this loan, no one connected with the Metropolis Construction Co. had any dealings with anybody in the Bank except myself and the president, Mr.



(Testimony of John B. Lewis.)

Freitas. I don't [273] remember any more of the case.

**[Testimony of John B. Lewis, for Complainant.]**

JOHN B. LEWIS, being duly sworn as a witness on behalf of complainant, testified as follows:

Direct Examination.

I am Deputy in the Auditor's office of the City and County of San Francisco. I have occupied that position for about six years. As such Deputy Auditor, I am familiar with the general routine of the office. As to the general course of procedure with reference to demands or warrants after they arrive at the Auditor's office, up to the time they get back again from the Treasurer, they are placed within the proper book; they are registered and they are audited, if there is no objection to them, and passed out to the party who is entitled to the warrant. It goes to the treasurer's office and is paid there. There the warrant is marked "paid" and is cancelled; marked with a cancellation stamp over it. The person writes his name in the "received payment" place; then it is returned to the Auditor's office, stamped "paid" on the books, on the register, and then it is placed on file, in the filing case.

(Counsel for complainant shows witness three demands, all in favor of the Metropolis Construction Co.; the first, for \$8,400.69, being third payment on sewer contract No. 31 for the Seventh Street sewer; the second for \$6,964.13, for the payment on account of the Fourth and Kentucky Street sewer; and the



(Testimony of John B. Lewis.)

third for \$10,864.57, being for the third payment on contract No. 36, for the Lower Sunset sewer.)

Those demands were paid November 22, 1910, that is, the first demand—the Seventh Street sewer. That bears a receipt [274] for the money; I see a name there, evidently L. F. Strong. I am not familiar with the signature of L. F. Strong. It is evidently, however, the same signature as appears on the face of the demand. I should think it was the same signature.

Cross-examination.

I was not in the Treasurer's office when these demands were paid; I don't know who received the money on these warrants.

**[Testimony of V. L. De Figueiredo, for Defendant  
(Recalled).]**

V. L. DE FIGUEIREDO, recalled as a witness on behalf of Portuguese-American Bank, defendant, being duly sworn, testified as follows:

During the month of November, 1910, our Bank made a loan of about \$20,000 to the Metropolis Construction Co. and took, as security, an assignment of certain moneys due the Metropolis Construction Co. from the City and County of San Francisco for the third progress payments on certain contracts then being carried out by the Metropolis Construction Co., for the City and County of San Francisco. We received the repayment of the amount of that loan on the 22d day of November, 1910, the amount of \$45,526.14, being the amount of the warrants for that particular payment. As to the amounts of the war-

(Testimony of V. L. De Figueiredo.)

warrants that were assigned to the Bank as security for the loan I have just testified to, I don't remember the amount of each warrant, but the total aggregates \$45,526.14. I don't remember the amount of the warrants that were assigned to the bank.

(Counsel for defendant Portuguese-American Bank shows witness a paper showing supposed amount.) [275]

That refreshes my mind; that is right.

(Counsel for defendant Portuguese-American Bank introduces in evidence an order on Thomas F. Boyle, the Auditor of the City and County of San Francisco, dated November 19, 1910, marked "Received at the Auditor's office November 15, 1910"; marked "Portuguese-American Bank Exhibit No. 6.")

That order on the Auditor shows the authority of the Portuguese-American Bank to take warrants aggregating about \$29,000. I received that money. That money was a part of the \$45,000 that I testified I received. I went to the auditor's office and made a demand for the warrants, stating that I was the cashier of the Portuguese-American Bank. The auditor didn't know me, and I had some one from the Treasurer's office to identify me. I don't remember who it was, if it was Mr. McDonald himself or someone else in the office; I don't remember just who it was. But I was identified before the auditor and he turned the warrants to me. Mr. Chris Emille and Mr. Strong were with me at the time. Then I took the warrants to the Treasurer and got the

(Testimony of V. L. De Figueiredo.)

money. That money was the whole amount, \$45,526.14. That includes other warrants also. Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion. The warrants were made out in the name of the Metropolis Construction Co.; and the auditor, the only thing that he had was an order to deliver those orders to us, although our name didn't appear on the warrants, only on the order; therefore Mr. Strong signed them. I received the money and not Mr. Strong. I deposited the money with the Crocker National Bank for the account of our bank, on the very same date, on the 22d. [276]

Cross-examination.

I said the warrants were made out in the name of the Metropolis Construction Co. Mr. Strong was assistant secretary of that Company, and the other gentleman who was with me, Mr. Emille, was president of the company. What I had was this paper that we introduced here. That was the paper that was filed, an order to get the warrants. We all went there and took the money and Mr. Strong, at my suggestion, wrote on the back of the warrants, so that the warrants would not be changed. The paper didn't give me any authority at all, for changing the warrants. The paper gave me authority to receive the money. The paper itself, the demands, were made out in the name of the Metropolis Construction Co.

Redirect Examination.

As to how Mr. Strong happened to be with me that



(Testimony of V. L. De Figueiredo.)

day, Mr. Strong and Mr. Emille came up to the bank in an automobile, because, the amount being a large amount, I could not carry that in my hand; so they came up in an automobile and asked me if they could be of any service to me to carry the money for us; and that is why they went up.

**[Testimony of James B. Feehan, for Defendant  
(Recalled).]**

JAMES B. FEEHAN, recalled as a witness for Portuguese-American Bank of San Francisco, being duly sworn testified as follows:

On December 17, 1910, I filed with the Board of Supervisors of this City and County a letter, a copy of which I now offer in evidence.

(Copy of letter dated December 17, 1910, addressed to the Board of Public Works and to the Board of Supervisors of the City and County of San Francisco was introduced in evidence and marked "Defendant Portuguese-American Bank's Exhibit No. 5.") [277]

On December 19, 1910, between the hours of 9:30 and 10 o'clock in the morning, I left another copy of that letter with the Secretary of the Board of Public Works, to be given to said Board. On December 19, 1910, about 9 o'clock in the morning, I left another copy of that letter with the auditor of this City and County. On January 4, 1911, I left another copy with the Treasurer of this City and County.

**[Testimony of J. L. McCormick, for Complainant.]**

J. L. McCORMICK, called as a witness on behalf of complainant, being duly sworn, testified as follows:

I am the Secretary of the Board of Public Works of San Francisco.

The witness produces the contract described in the bill of complaint between the Metropolis Construction Company and the Board of Public Works of San Francisco for the construction of sewers in Fourth and Kentucky Streets, which was admitted in evidence.

The following from the specifications annexed to said contract was read in evidence:

**“PAYMENTS.**

“In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

“The first estimate shall be of the value of the labor done and materials incorporated into the herein proposed work since the contractor commenced the performance of the contract on his part and every subsequent estimate except the final estimate shall be [278] of the value of labor done and materials incorporated into the herein proposed work since the last preceding estimate was made. Provided, however, that no such estimate shall be required to be made, when in the judgment of the City

(Testimony of J. L. McCormick.)

Engineer the total value of the labor done and materials incorporated into the herein proposed work since the last preceding estimate amounts to less than \$5,000. Such estimates need not be made by strict measurements, but they may be approximate only and shall be based upon the whole amount of money that will become due according to the terms of the contract when the whole of the herein proposed work shall have been completed.

“Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer’s estimate.

“Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications.”

It was stipulated between respective counsel that on December 19, 1910, at the hour of 11 o’clock and 5 minutes A. M., a petition was filed in this court praying that the Metropolis Construction Company be adjudicated a bankrupt.

Defendant’s Portuguese-American Bank Exhibit No. 1, referred to in the foregoing testimony, is as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 1.]**

Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Com-



pany be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and [279] appurtenances in Kentucky Street and Fourth Street.

### BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 1. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 2, referred to in the foregoing testimony, is in words and figures as follows:

#### **[Defendant Portuguese-American Bank Exhibit No. 2.]**

Resolution No. 8399, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of nineteen thousand, one hundred sixty-seven dollars and twenty cents (\$19,167.20) as fourth progress payment on its contract for the construction of sewers and appurtenances in Seventh Street, from Howard to Hubbell Streets.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank [280] Exhibit No. 2. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 3, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 3.]**

Resolution No 8400, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of twelve thousand, one hundred seventy three dollars and seventeen cents (\$12,173.17) as fourth progress payment on its contract for the construction of sewers and appurtenances in the Lower Sunset District.

**BOARD OF PUBLIC WORKS.**

Dec. 5, 1910.

(Seal of Board of Public Works.)

Passed.

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.

(Endorsed:) Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 3. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit

No. 4, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 4.]**

On motion duly seconded, it was unanimously resolved as follows:

That Chris Emille be, and he is hereby appointed the General Manager of the Metropolis Construction Company, and that as such General Manager he shall have full and exclusive [281] charge and management of the conduct of the affairs of this Corporation. That as such General Manager he shall have full power and authority to compromise and adjust lawsuits, pay obligations, borrow money, to hire and discharge such employees as may be necessary from time to time, to carry on the work and affairs of this Corporation; he shall also be empowered to fix the wages and salaries of such employees and, from time to time, to pay the same out of the funds of this Corporation; he shall also be empowered to purchase such supplies, merchandise, horses, machinery, equipment and other personal property as may be necessary in his judgment, from time to time, to carry on the affairs, work and contracts of this corporation, and at such price or prices as his judgment may dictate. He shall also be empowered to do and perform such other acts and things as may be necessary from time to time to carry on and conduct the affairs of this corporation.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 4 for Identification. August 18th, 1911. A. B. Kreft, Referee.



Defendant's Portuguese-American Bank Exhibit No. 5, referred to in the foregoing testimony, is in words and figures as follows:

**[Defendant Portuguese-American Bank Exhibit  
No. 5.]**

“San Francisco, December 17, 1910.

To the Auditor and to the Board of Public Works  
and to the Board of Supervisors of the City and  
County of San Francisco:

Gentlemen: You are hereby notified that the Metropolis Construction Company has assigned for value to the Portuguese-American [282] Bank of San Francisco, the warrants in its favor against the City and County of San Francisco, for the amounts of money hereinafter set forth, being progressive payments on account of the contracts hereinafter set forth, to-wit:

1st: Warrant for the sum of \$6,830.85, being fourth progressive payment on account of contract, dated Jan. 5th, 1910, for Kentucky and Fourth Street sewers, the contract being between the Metropolis Cons. Co. and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$12,173.17, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said city and county, and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$19,167.20, being fourth progressive payment on account of contract between the Metropolis Cons. Co. and said City and County and dated June 22nd, 1910, and being for

construction sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

Said assignment was made on the 5th day of December, 1910, and subsequent to the resolutions of the Board of Public Works, authorizing said fourth progressive payments.

Yours very truly,

PORTUGUESE-AMERICAN BANK OF  
S. F.

JAMES B. FEEHAN,  
Attorney."

(Endorsed:) Filed in *Supervisors* 70 Eddy  
St. Dec. 17, 1910. John H. Ryan, Acting Clerk.  
[283] Welles v. Daniel et al. Defendant's Portuguese-American Bank Exhibit No. 5. A. B. Kreft, Referee.

Defendant's Portuguese-American Bank Exhibit No. 6, referred to in the foregoing testimony, is in words and figures as follows, to wit:

**[Defendant Portuguese-American Bank Exhibit  
No. 6.]**

"San Francisco, Cal., November 19th, 1910.  
Thomas F. Boyle, Esq., Auditor of the City and  
County of San Francisco:

Dear Sir:—You will please take notice, and you are hereby notified, that the Portuguese-American Bank of San Francisco is hereby authorized and empowered to draw the warrants in favor of the undersigned against said City and County, for the amounts of money hereinafter set forth, and being progressive payments on account of the contracts hereinafter set forth, to wit:

1st: Warrant for the sum of \$6,964.13, being third progressive payment on account of contract dated January 5th, 1910, for Kentucky and Fourth Street sewers; the contract being between the undersigned and said City and County under the bond issue of 1903.

2nd: Warrant for the sum of \$10,864.57, being third progressive payment on account of contract between the undersigned and said City and County and dated March 25th, 1910, for Lower Sunset District Sewer, and being contract No. 36.

3rd: Warrant for the sum of \$4,182.00, being 7th progressive payment under contract between the undersigned and said City and County and dated January 10th, 1903 for the construction of sewer in West Richmond District, and being [284] under bond issue of 1903.

4th: Warrant for the sum of \$8,400.69, being third progressive payment on account of contract between the undersigned and said City and County and dated June 22nd, 1910, and being for construction of sewer in 7th Street, Howard to Hubbell Streets, under contract No. 31.

METROPOLIS CONSTRUCTION COM-  
PANY.

(Seal of Metropolis Construction Co., Inc.)

By CHRIS EMILLE,

President.

By L. F. STRONG,

Asst. Secretary."



Received Auditor's Office Nov. 15, 1910.

THOS. F. BOYLE,  
Auditor,  
By Ed. Ingwersen,  
Deputy.

(Endorsed:) Welles v. Daniel. Defendant's Portuguese-American Bank Exhibit No. 6. A. B. Kreft, Referee.

The foregoing constitutes the testimony taken prior to October 14, 1911, and upon which the report of the Referee and Examiner of October 14, 1911, is based.

The proceedings and testimony following took place on January 9th and 17th, 1912, pursuant to the order of reference made on December 26th, 1911.

[285]

Mr. FROST.—The Court will please notice that although notice has been duly given, no appearance has been made on behalf of Auditor Boyle. Simply for the sake of getting the record straight, that matter ought to be noted. Now, I hold in my hand here a report of the referee in this case, the case of Paul I. Welles against John Daniel, filed October 14, 1911, the original report, which I offer in evidence.

Mr. HEGGERTY.—No objection.

Mr. FROST.—I ask that that report be considered as read. It is agreed that it need not be incorporated into the evidence. I offer in evidence a memorandum opinion by Judge De Haven, dated and filed December 12, 1911, in this case, and ask that it be considered read, also that it need not be incorporated into the

transcript, being in the files of the court. Any objection?

Mr. HEGGERTY.—No objection.

Mr. FROST.—The same offer is made with reference to the order made December 13, 1911, by the District Court, in this matter, filed December 13, 1911, entitled “Order Approving Report of Referee Granting Injunction, etc.,” and ask that this be considered read and not incorporated in the transcript by the stenographer. Complainant rests.

Mr. HEGGERTY.—Subject, of course, if the Court please, to our former objections in which we excepted to the jurisdiction of the Court and stated that we were not appearing and consenting to this action or to this proceeding, we offer in evidence the following portion of the specifications of the contract, the original of which is attached to the bill of complaint, and the original contract, together with the sub-contract being attached [286] to the original bill of complaint in this action, and the specifications being attached to the claim of Mr. Welles in the claim in the bankruptcy matter which is an exhibit in this case. We offer the specifications of the original contract for which specifications are attached as an exhibit to the claim of Mr. Welles, the complainant, in this action, heretofore filed and now on file in this bankruptcy proceedings No. 6827 in bankruptcy, being the bankruptcy of the Metropolis Construction Co., a corporation.

Mr. FROST.—Attached to the claim of Paul I. Welles in the matter of the Metropolis Construction Co., a bankrupt, No. 6827, are the specifications which



have been admitted in evidence with that claim in this case as being the specifications annexed to the original contract of the Metropolis Construction Co. with the City, involved in this case. I understand counsel wants to offer those specifications or some part thereof. What part do you wish to offer?

Mr. HEGGERTY.—The portion of the specifications under the heading “Subcontract” starting with “Sub-contractor”; the sub-heading “Sub-contractor.” We offer in evidence the following portion of the specifications described by Mr. Frost commencing with the word “Sub-contract” in the left-hand margin down to and including the words “Contractor’s Foreman” in the left-hand margin.

Mr. FROST.—That is objected to on the ground, if your Honor please, that all the issues in this case were found upon the former hearing, and that the findings of fact completely cover all the findings upon all the issues raised by the pleadings; that those findings are conclusive and that unless new issues appear now, that no testimony can be received. [287] That was one of the things that was gone into on the former hearing.

The REFEREE.—What is the purpose of this particular offer?

Mr. HEGGERTY.—We object to being bound or having the referee bound or foreclosed as requested and suggested by Mr. Frost, attorney for complainant, by the report of the referee and by the memorandum opinion to the order introduced in evidence here in this proceeding, the same not being *res adjudicata* or a bar or any other sense or in any respect



to the introduction upon this proceeding or upon this reference of all relevant material and competent evidence within the issues in this case; furthermore, that that report was not a report and is not an adjudication, nor is the order of Court an adjudication upon any matter of fact or thing whatsoever involved in or to be proved, heard, determined and reported, by the referee in pursuance of the order of reference in this proceeding last made, and that your Honor, on the last order of Reference upon which this hearing is taking place, is in duty bound to hear all relevant matter and competent evidence offered by either party or any party to this action, and to report the same in pursuance of the order of reference to the Honorable District Court, 1st Division, in which this cause is pending.

Mr. FROST.—(After argument.) Without waiving my objections, I will make this stipulation that all of the specifications annexed to the contract of the Metropolis Construction Co., with the City and County of San Francisco, and the contract itself, shall be considered in evidence in this cause. Now, that contract is an exhibit with the bill of complaint in this case, and the specifications are annexed to the claim of Mr. Welles in the matter of the Metropolis Construction Co., No. 6827 which is also an exhibit in this case. It is agreed that those specifications, in part or in whole, [288] may be referred to by counsel on argument in this case, and that they may be admitted in evidence, but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to; and that

stipulation is made with the understanding that the objection of complainant to the taking of further testimony is not waived. The stipulation is also made subject to the same reservation that all of the testimony taken upon the former hearing may be considered as evidence upon this hearing as having been heard and read, together with all exhibits introduced upon the former hearing, with the same force and effect as if repeated here, subject to the objection of complainant that this court has not now the right to take further testimony upon that issue.

The REFEREE.—So that I may understand you, the effect of those stipulations is that the evidence may be used in this proceeding, but it is not to be used to change the findings of fact as made?

Mr. FROST.—Yes.

Mr. HEGGERTY.—The same objections and exceptions as appear in the original testimony will be considered as having been taken and made.

Mr. FROST.—Exactly. It is the intention of the stipulations to cover the ground, and if it is not covered, we will cover it.

The REFEREE.—Counsel for the Portuguese-American Bank may introduce such further evidence upon the issues raised by answer to the bill. All the testimony taken on the former hearing is in evidence, together with the exhibits thereon.

Mr HEGGERTY.—As I understand the stipulation, your Honor, it is that all the exhibits, whatever they may be, referred to in the report made by your Honor, or that were introduced by the parties at the last reference, or that appear attached to the [289]



pleadings, either the complaint or the answers, of all the parties or any of the parties, and to the answers to the order to show cause, and the claim exhibits attached to it by Mr. Welles, the complainant, are admitted to have been offered, and are admitted in evidence, subject to the objections of Mr. Frost that the report of the referee heretofore made and confirmed by the Court, and the order of the Court based thereon, prohibit and exclude this evidence or any other evidence upon this hearing. Is that correct?

Mr. FROST.—Yes, that is the situation as I understand it. I take it that there will be nothing new, nothing that I don't know anything about, brought in under that stipulation; but all the evidence that was taken on that former hearing, subject to my objection can come in; and "all evidence" means proceedings, stipulations, exhibits, testimony and the whole record.

Mr. HEGGERTY.—We offer in evidence the following portion of the General Provisions above referred to:

"SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for his permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for



subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together [290] with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."

Mr. HEGGERTY.—Mr. Frost is willing to stipulate, as I understand it, that the Portuguese-American Bank, one of the defendants in this action, at all times mentioned in the bill of complaint was, and is now, a legally created and existing banking corporation, doing business as such in the City and County of San Francisco?

Mr. FROST.—Yes.

Mr. HEGGERTY.—And that the charter of the

City and County of San Francisco as it existed June 1, 1910, and since then to the present time, may be deemed to have been offered and admitted in evidence, and such parts thereof as either party or any party to the action, desires to refer to and use, may be referred to and used as evidence? [291]

Mr. FROST.—Either by incorporation into the transcript, or later on, in argument to the Court.

Mr. HEGGERTY.—We desire to have incorporated into the record this matter which is found in the answer of the Portuguese-American Bank of San Francisco:

#### “MATTERS UNDER CONTROL OF THE BOARD.

Sec. 9. The Board of Public Works shall have charge, superintendence and control, under such ordinances as may from time to time be adopted by the Supervisors.

#### DRAINAGE.

2. Of all sewers, drains and cesspools, and of the work pertaining thereto, or to the drainage of the City and County.

#### CONDUITS; GARBAGE AND SEWAGE; SEWERAGE AND DRAINAGE SYSTEM.

7. Of any and all wires and conduits, the collection and construction and maintenance of the sewerage and drainage systems of the City and County.

Sec. 9, Art. VI, Chap. I.

#### ACCEPTANCE OF WORK.

Sec. 22. The work in this Article (Article VI) provided for must be done under the direction and to the satisfaction of the Board of Public Works.

. . . . When said work shall have been completed to the satisfaction and acceptance of the Board, it shall so declare by resolution, and thereupon the Board shall deliver to the contractor a certificate to that effect.

Sec., 22, Art. VI, Chap. I.”

Mr. HEGGERTY.—Will you admit that the assignment of the sub-contract by the Metropolis Construction Co. to Mr. Welles, the complainant in this action, was not consented to by the Board of Public Works? [292]

Mr. FROST.—I will admit this, that there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also, however, admitted that Mr. Welles acted as a sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone book, and he had his sign, “Paul I. Welles” as the sub-contractor on the job.

Mr. HEGGERTY.—That is the case for the defendant.

Mr. FROST.—It will be admitted that the United Railroads has filed a claim in these bankruptcy proceedings January 4th, 1912; “these bankruptcy proceedings” meaning those of the Metropolis Construction Co., No. 6827.

(Testimony closed; case submitted on briefs to be filed.)

The foregoing condensed statement of said evi-



dence is hereby proposed as a statement to be included in the record for use on appeal herein, and appellants pray that the same be settled and allowed.

Dated February 20, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and  
Appellant. [293]

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant and  
Appellant.

Approved ———, 1913.

\_\_\_\_\_,  
Judge.

**[Stipulation Approving Engrossed Statement of  
Proceedings and Testimony.]**

The foregoing engrossed statement of proceedings and testimony is approved and may be settled and allowed by the Court.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,

Attorneys for Portuguese-American Bank of San Francisco, a Corporation, Defendant and Appellee.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. M. AIKINS,  
MILTON J. GREEN,

Attorneys for John Daniel, Trustee, Defendant and Appellant.

C. A. S. FROST,  
Attorney for Paul I. Welles, Complainant and Appellant.

EDWARD F. MORAN,

Atty. for Defendant Boyle, as Auditor. [294]

**[Order Approving and Allowing Engrossed Statement of Proceedings and Testimony.]**

The foregoing and engrossed statement of proceedings and testimony is approved and allowed.

FRANK S. DIETRICH,  
Judge.

Dated March 15th, 1913.

Receipt of a copy of the within Statement of Pro-

ceedings and Testimony to be Included in the Record  
this 20th day of February, 1913, is admitted.

JAMES B. FEEHAN,  
KNIGHT & HEGGERTY,  
Attorneys for Defendant Portuguese-American  
Bank.

EDWARD F. MORAN,  
Attorney for Thomas F. Boyle.  
Received Feb. 21, 1913.

W. B. MALING,  
Clerk.  
By C. W. Calbreath,  
Deputy Clerk.

Filed Mar. 18, 1913. [295]

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**[Certificate of Clerk U. S. District Court to Trans-  
script of Record, etc.]**

United States of America,  
Northern District of California,—ss.

I, W. B. Maling, Clerk of the District Court of the  
United States for the Northern District of Cali-  
fornia, hereby certify the foregoing and hereunto  
annexed two hundred and ninety-five pages, num-  
bered from 1 to 295, inclusive, contain a full, true  
and correct transcript of the records, as the same  
now appear on file and of record in the Clerk's office  
of the said District Court, in the cause entitled "Paul  
I. Welles, Complainant, vs. John Daniel, Trustee of  
the Estate of Metropolis Construction Company, a  
Corporation, Bankrupt, Portuguese-American Bank  
of San Francisco, a Corporation, and Thomas F.



Boyle, Defendants," and numbered "15,148."

Said transcript has been prepared and made up pursuant to the Praecipos of respective counsel therein, copies of which said Praecipos are incorporated in this Transcript (pages 1 to 8 inclusive), and the personal instructions of C. A. S. Frost, Esquire, Messrs. Knight and Heggerty, and James B. Feehan, Esquire, Attorneys for Appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript on Appeal is the sum of One Hundred Fifty-seven Dollars and Seventy cents (\$157.70), and that the same has been paid to me in full as follows: \$154.25, by John Daniel, Defendant and Appellant, and \$2.45, by the Portuguese-American [296] Bank, etc., Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of May, A. D. 1913.

[Seal]

W. B. MALING,  
Clerk.

By Lyle S. Morris,  
Deputy Clerk. [297]

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[Title of Court and Cause.]

**Citation [on Appeal—Original].**

To Portuguese-American Bank of San Francisco, a Corporation, Defendant, to Thomas F. Boyle, Defendant, Greeting:

WHEREAS, John Daniel, Trustee of Metropolis Construction Company, a corporation, bankrupt, defendant in the above-entitled controversy, and Paul

I. Welles, complainant in said controversy, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order or Decree lately, and on January 30th, 1913, rendered in the District Court of the United States for the Northern District of California, made in favor of said Portuguese-American Bank of San Francisco, a corporation, you are, therefore, hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the said District on the 10th day of March, 1913, to do and receive what may appertain to justice to be done in the premises.

WITNESS the Hon. WM. C. VAN FLEET, Judge of said District Court, this 10th day of February, in the year of our Lord nineteen hundred and thirteen and of the Independence of the United States of America the one hundred and thirty-seventh.

WM. C. VAN FLEET,

Judge.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Portuguese-American Bank of San Francisco, a Corpn., by handing to and leaving a certified copy thereof with V. L. de Figueiredo, Cashier of said Portuguese-American Bank of San Francisco, a Corpn., personally at San

Francisco, in said District, on the 11th day of February, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By Elmo Warner,  
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Citation on the therein named Thomas F. Boyle, by handing to and leaving a certified copy thereof with Thomas F. Boyle, personally, at San Francisco, in said District, on the 11th day of February, 1913.

C. T. ELLIOTT,  
U. S. Marshal.

By \_\_\_\_\_,  
Deputy.

Filed Feb. 10, 1913.

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[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Transcript of Record. Upon Appeals from the United States Dis-



trict Court for the Northern District of California,  
First Division.

Filed May 12, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

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[Title of Court and Cause.]

**Order Enlarging Time [Thirty Days] to File Record  
and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have thirty days' further time within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court.

WM. W. MORROW,  
Judge.

Dated March 7, 1913.

Receipt of a copy of the within Order the 7th day of March, 1913, is acknowledged.

KNIGHT & HEGGERTY and  
JAS. B. FEEHAN,  
Attorneys for Portuguese-American Bank of San  
Francisco, Defendant and Appellee.

EDWARD F. MORAN,  
Attorney for Thos. F. Boyle, Defendant and Appellee.

Filed Mar. 7, 1913.

[Title of Court and Cause.]

**Order Enlarging Time [to May 7, 1913] to File  
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have thirty (30) days' further time within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court, to wit, thirty days from and after April 7th, 1913.

WM. C. VAN FLEET,  
Judge.

Dated April 5th, 1913.

Time extended thirty days by order March 7, 1913.

Filed Apr. 5, 1913.

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[Title of Court and Cause.]

**Order Enlarging Time to [May 12, 1913] to File  
Record and Docket Cause.**

On motion of counsel for appellants, it is ORDERED that appellants have to and including Monday, May 12th, 1913, within which to file the record and docket the case, pursuant to Rule Sixteen of the above-entitled court.

Dated May 7th, 1913.

WM. C. VAN FLEET,  
Judge.

The foregoing extension of time may be granted.

KNIGHT & HEGGERTY,  
JAMES B. FEEHAN,  
Attorneys for Respondent.

Filed May 7, 1913.

Refiled May 12, 1913.

[Title of Court and Cause.]

**Stipulation Concerning Printing of the Record.**

To the Clerk of the Above-entitled Court:

In printing the record you will not print the following:

1. All titles of court and cause, after the first. Insert in lieu of each, the words "Title of Court and Cause," except the entire caption or preamble and title of minute order of December 12, 1911, to be set out in full.

2. Verifications. In lieu thereof print the words "duly verified," with date of verification.

3. Endorsements, except the date of filing.

Dated May 12, 1913.

A. F. MORRISON,  
P. F. DUNNE,  
W. I. BROBECK,  
GAVIN McNAB,  
B. MAIKINS,  
MILTON J. GREEN,  
\_\_\_\_\_,  
\_\_\_\_\_.

Attorneys for John Daniel, Trustee, etc., Defendant  
and Appellant.

C. A. S. FROST,  
Attorney for Paul I. Welles.  
JAMES B. FEEHAN,  
CHARLES J. HEGGERTY,

Attorneys for Portuguese-American Bank of San  
Francisco, a Corporation, Defendant and Ap-  
pellee.

Filed May 14, 1913.



No. 2273

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt,  
Appellants,  
vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation,  
Appellee.

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Supplemental  
Transcript of Record.

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Upon Appeal from the United States District Court  
for the Northern District of California,  
First Division.

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FILED

MAY 14 1914



No. 2273

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt,  
Appellants,  
vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation,  
Appellee.

---

Supplemental  
Transcript of Record.

---

Upon Appeal from the United States District Court  
for the Northern District of California,  
First Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2273.

PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COM-  
PANY, a Corporation, Bankrupt,  
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO, a Corporation,  
Appellee.

**Order on Motion of Appellee for a Writ of Certiorari  
for Diminution of the Record or for Correction  
of Omission from Record by the Filing of a  
Supplemental Transcript of Certain Portions of  
the Record and Evidence.**

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed

herein, under Rule 76 of the Rules of Practice in Equity, argued by Mr. Charles J. Heggerty, counsel for the appellee and on behalf of said motion, and by Mr. C. A. S. Frost, counsel for the appellants and in opposition to said motion, and submitted to the Court for consideration and decision.

Thereupon, on consideration thereof, and the Court being fully advised in the premises, it is ORDERED that the said Motion be, and hereby is granted, and that Mr. Heggerty be, and he hereby is allowed ten (10) days within which to file an additional brief and a certified supplemental transcript of certain additional portions of the record and evidence in the above-entitled cause.

**[Excerpt from Specifications Forming Part of Contract Between the Metropolitan Construction Co. and the Board of Public Works of the City and County of San Francisco, State of California (Annexed to Claim of Paul I. Welles).]**

#### GENERAL PROVISIONS.

**CITY ENGINEER:** Whenever the words "City Engineer," or the personal pronoun used in place thereof, are used herein, they shall be and are mutually understood to refer to the City Engineer of the City and County of San Francisco, State of California, acting directly or through properly authorized agents, limited by the particular duties entrusted to them.

**BOARD OF PUBLIC WORKS:** Whenever the words "Board of Public Works," or the personal pronoun used in place thereof, are used herein, they



shall be and are mutually understood to refer to the Board of Public Works of the City and County of San Francisco, State of California, acting directly or through properly authorized agents limited to the particular duties entrusted to them.

INSPECTOR: Whenever the word "Inspector," or the personal pronoun used in place thereof, is used herein, it shall be and is mutually understood to refer to the inspector or inspectors of the Bureau of Engineering, of the Department of Public Works, of the City and County of San Francisco, State of California, limited by the particular duties entrusted to him or them.

CONTRACTOR: Whenever the word "Contractor," or the personal pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the party or parties contracting to perform the work to be done under this contract, or the legal representatives of such party or parties.

CITY: Whenever the word "City," or the pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the City and County of San Francisco, State of California. [1\*]

WORK TO BE DONE TO THE SATISFACTION OF THE BOARD OF PUBLIC WORKS: The Contractor shall do all the work and furnish all the labor, materials, tools and appliances necessary or proper for performing and completing the work herein required in the manner and within the time herein specified, and the work must be done in a workman-

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\*Page-number appearing at foot of page of original certified Record.



like manner and under the direction and to the satisfaction of the Board of Public Works, and the materials must be in accordance with the specifications and to the satisfaction of the Board of Public Works.

**INSPECTION:** All work and materials, and the manufacture and preparation of such materials from the beginning of the construction until the final completion and acceptance of the herein proposed work, shall be subject to the inspection and rejection of the City Engineer at such times as may suit his convenience.

The City Engineer may assign such assistants as he may deem necessary to inspect the materials to be furnished and the work to be done under this contract, and to see that the same strictly correspond with the specifications herein set forth.

Any unfaithful or imperfect work or materials that may be discovered before the completion and acceptance of the herein proposed work shall be corrected immediately on the requisition of the City Engineer, notwithstanding that it may have been overlooked by the proper inspector, and it is hereby expressly agreed that the inspection of the City Engineer shall not relieve the Contractor of his liability to furnish material and workmanship in accordance with the specifications and to the satisfaction of the Board of Public Works.

The Contractor shall promptly obey and follow every order or direction which shall be given by the Board of Public Works in accordance with the terms of the contract. [2]

No inspector will be furnished to any gang of less than twelve (12) men, nor will any lines, levels or grades be furnished or given, when in the opinion of the Engineer, the number of men employed is too small to make proper progress.

Any work done during the absence of an Engineer or Inspector will not be estimated or paid for.

**WORK TO BE DONE TO LINE AND GRADE:**

All work under these specifications shall be done to the lines and grades shown on the plans, points for which will be set by the City Engineer, and the work shall be prosecuted in such manner and from such points, at such times and with such forces as the City Engineer may determine from time to time during its progress.

**ACCESS TO WORK:** During the construction of the herein proposed work, the Board of Public Works and the agents and employees of the Board of Public Works may at any time and for any purpose enter upon the work or the shops where such work may be in preparation and the Contractor shall provide proper and safe facilities therefor. Other contractors performing work for the City under the Board of Public Works may also, for all purposes which may be required by their contracts, enter upon the work.

**INSPECTOR NOT TO BE INTIMIDATED:** The Inspectors at all times shall be free to perform their duties and any intimidation of any Inspector on the part of the Contractor or of the employees thereof, shall be sufficient reason, if the Board of Public Works shall so decide, to annul the contract.



### INTERPRETATION OF SPECIFICATIONS:

These specifications and plans are intended to be self-explanatory, but should any discrepancy appear or any misunderstanding arise as to the import of anything contained herein, the matter may be referred to the City Engineer, who shall decide the same in accordance with their true intent and meaning [3] as construed by him.

Any corrections of errors or omissions in these specifications or plans may be made by the City Engineer, when such correction is necessary for the proper fulfillment of their intention as construed by him.

The misplacement, addition or omission of any word, letter, figure or punctuation mark will in no way change the true spirit, intent or meaning of these specifications.

Wherever in the specifications, the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood that the direction, requirement or permission of the Board of Public Works is intended. Similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean "approved by," or "acceptable to" or "satisfactory to" the Board of Public Works.

Whenever any article or any class of materials is specified by a trade name or by the name of any particular patentee, manufacturer or dealer, it shall be and is mutually understood to mean and specify the article or materials described, or any other equal thereto in quality, finish and durability, and equally



as serviceable for the purposes for which it is or they are intended, subject to the approval and acceptance of the Board of Public Works.

Any part of the work which is not mentioned in these specifications but is shown on the drawings, or any part not shown on the drawings but described in the specifications, or any part not shown on the drawings or described in the specifications, but which is reasonably implied by either or is necessary or usual in the construction of work of this class shall be furnished and installed by the Contractor as if fully described in the specifications and shown on the drawings.

**LAWS AND REGULATIONS:** In all operations connected with the work, the Charter and all ordinances of the City and County of San Francisco, and all laws of the United States and the State of California. [4] which shall be or become applicable to, and control or limit in any way the actions of those engaged in any way as principal or agent, shall be respected and strictly complied with. The Contractor shall keep himself fully informed of all existing State and National laws and City ordinances and regulations in any manner affecting those engaged and employed in or on the work or in any way affecting the conduct of the work, and of all orders or decrees of bodies or officials having jurisdiction or authority over the same. He shall, himself, at all times, observe and comply with and cause any and all persons, firms or corporations employed by him or under him, to observe and comply with all such laws, ordinances and regulations, orders and decrees.

He shall protect and indemnify the City and County of San Francisco, the Board of Public Works and its or their officers, employees and agents against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

**LEGAL ADDRESS:** The address given in the bid or proposal is hereby designated as the legal address of the Contractor, but such address may be changed at any time by notice in writing, delivered to the Board of Public Works.

The delivering to such legal address or the depositing in any postoffice in a postpaid wrapper, directed to the Contractor at the above address of any drawing, notice, letter or other communication, shall be deemed to be a legal and sufficient service thereof upon the Contractor.

**CONTRACTOR TO MAINTAIN OFFICE:** The Contractor shall maintain an office equipped with telephone instruments connected with local and long distance telephone, in the City and County of San Francisco, during the continuance of his contract and shall have in said office at all times between 8:30 A. M. and 5:00 P. M. (Sundays and legal [5] holidays excepted), a representative authorized to receive drawings, notices, letters, or other communications from the Board of Public Works and such drawings, notices, letters or other communications given to or received by such representatives, shall be deemed to have been given to and received by the Contractor.

The delivering at or mailing to the Contractor's



office in the City and County of San Francisco (written notice of which address shall be given to the Board of Public Works within ten days of the date of the contract) or the delivering to the Contractor in person or to his authorized representative in said City of San Francisco, of any drawing, notice, letter, or other communication shall also be deemed to be a legal and sufficient service thereof upon the Contractor.

**COMMENCEMENT AND PROSECUTION OF WORK:** The Contractor will be required to commence the work provided for in these specifications within fifteen (15) calendar days after the signing of the contract and to prosecute it diligently from day to day thereafter at such a rate as will enable him to complete the various parts of the work and the whole work within the time herein specified.

**TESTS:** All test specimens necessary for the determination of the character of any of the materials to be used or offered for use in the work herein proposed will be prepared and tested by the City Engineer.

Whenever required by the City Engineer, the Contractor shall furnish all tools, labor and materials necessary to make an examination of any work under these specifications that may be completed or in progress. Should such work be found defective, the cost of making such examinations and of reconstruction shall be defrayed by the Contractor. Should the work be found to be satisfactory, the examination will be paid for by the City in the manner herein prescribed for paying for extra work. [6]



**SAMPLES:** Samples of all materials used or offered for use in connection with this work and information as to their sources must be furnished to the Board of Public Works whenever required, and representatives of the Board of Public Works are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work. Samples of the vitrified brick and steel for reinforcement must be submitted by the Contractor to the City Engineer for approval at least fifteen (15) days before it is proposed to use them in the work. Materials delivered on the work during its progress must be equal to the samples furnished. All materials will be inspected and any materials rejected must, on demand, be immediately removed from the work by the Contractor.

All samples shall be submitted in ample time to enable the City Engineer to make any tests or examinations necessary and the Contractor will be held responsible for any loss of time due to his neglect or failure to deliver the required samples to the City Engineer.

**DEFECTIVE MATERIALS AND WORKMANSHIP:** Materials, work or workmanship which in the opinion of the City Engineer do not conform to the specifications and drawings or are not equal to the samples submitted to and approved by the City Engineer shall be rejected.

If any materials used in the work or brought upon the ground, or selected for use in the same, shall be condemned by the City Engineer on account of bad or improper workmanship or as being unsuitable or

not in conformity with the specifications or not equal to the samples submitted, the Contractor shall forthwith remove from the work and its vicinity without delay all such rejected or condemned material of whatever kind, and upon his failure to do so within forty-eight (48) hours after having been so directed by the City Engineer, the condemned material may be removed by the Board of Public Works and the cost of said removal deducted from any money that is [7] then due or that may thereafter become due to the Contractor on account of or by virtue of his contract and no payments shall be made until such material, work or workmanship has been removed and proper materials and workmanship substituted therefor.

Materials or workmanship which, in the opinion of the City Engineer, do not comply with the requirements of the specifications or are not fully equal to the samples submitted to and approved by the City Engineer, may be rejected at any time during the progress of the work, notwithstanding any previous satisfactory testing or inspection on the part of the City Engineer.

**CONTRACTOR TO SUPPLY SUFFICIENT AMOUNT OF MATERIAL:** The Contractor shall at all times keep upon the premises a sufficient amount of materials and shall employ a sufficient number of workmen to complete the work herein specified within the time specified in the contract.

Should the Contractor at any time during the progress of the work refuse, neglect or be unable, in the judgment of the City Engineer, to supply a suf-



ficiency of materials or workmen to complete the work within the time specified in this contract, the City Engineer will notify the Board of Public Works that in his judgment, the Contractor is not providing sufficient materials or workmen to complete the work within the time specified in the contract. Upon receipt of such notice from the City Engineer, the Board of Public Works will notify the Contractor to furnish such workmen or materials as the City Engineer may consider necessary, and if the Contractor does not comply with said notice from the Board of Public Works within three (3) days of the date of service thereof, the Board of Public Works shall have the right to provide the materials and workmen to finish said work and the expense thereby incurred shall be deducted from any moneys due or which may thereafter become due under the contract. [8]

In order to meet the expenses so incurred, the Board of Public Works is hereby authorized by the Contractor to draw a warrant or warrants in the name of the Contractor and in favor of those persons, firms or corporations doing the work or providing the materials and labor, against the fund or appropriation set aside for the purposes of the contract, and when a warrant or warrants are so drawn they shall be conclusive upon the Contractor and shall be to all intents and purposes the same as if drawn by the Contractor in person, and the Auditor is hereby authorized by and on the part of the Contractor, to audit said demand or demands and the Treasurer is



hereby authorized by and on the part of the Contractor, to pay the same.

When any of said demands have been audited and paid, the amount of the same shall be deducted from the fund or appropriation set aside for the purposes of this contract and charged to the Contractor as if drawn by him.

The Board of Public Works shall have the option to terminate the contract in the manner hereinafter set forth, should the Contractor at any time during the progress of the work refuse, neglect, or be unable in their judgment, to supply a sufficiency of material or workmen to complete the work within the time specified in the contract.

**PATENTS:** All fees or claims for any patented invention, article or arrangement that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof shall be included in the price bid for doing the work herein proposed and the Contractor and his sureties shall protect and hold any and all departments of the City, together with all of its officers and employees, harmless against any and all demands made for such fees or claims against any and all suits and claims brought or made by the holder of any invention or patent, or growing out of any alleged infringement [9] of any invention or patent, and before the final payment is made on account of the contract, the Contractor shall furnish acceptable proof to the Board of Public Works of a proper release from all such fees or claims.

**CITY TO HAVE FREE USE OF PATENTS:**

The Contractor shall grant the City the free use for all time of any patented invention that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof, for the purpose of replacing or repairing any part or parts of the herein proposed work.

**SUB-CONTRACTS:** The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-



let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works. [10]

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.

**CONTRACTOR'S FOREMAN:** The Contractor shall at all times during his absence be represented on the work by a foreman or foremen whom he has authorized and who is or are competent to receive and carry out any instructions that may be given to him or them by the Board of Public Works or its representatives, and the Contractor will be held liable for the faithful observance of any instructions which may be delivered to him or to his authorized representative or representatives on the work.

**CONTRACTOR'S EMPLOYEES:** The Contractor shall employ only competent and skillful men to do the work and whenever the City Engineer shall notify the Contractor in writing that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or refuses to carry out the provisions of the contract or uses threatening or abusive language to any official or other person on the work representing the City and County of San Francisco, such man shall be immediately discharged from the work and shall not be employed again on it except with the consent of the City Engineer.

It is mutually understood and agreed that all the



laborers, skilled or unskilled (excepting confidential clerks, chief engineers and superintendents), who may be required in the construction of the work herein proposed, shall be citizens of the United States who are *bona fide* residents of the City and County of San Francisco.

**USE OF STREETS:** The Contractor shall not unnecessarily, in the judgment of the City Engineer, obstruct the streets or roadways by using them for storage of materials and supplies, and no materials or supplies [11] of any description shall be placed at any point along the line of the proposed sewers without first obtaining permission from the City Engineer.

**NIGHT WORK:** No night work requiring the presence of an engineer or inspector will be permitted, except in cases of emergency, and then only to such extent as is absolutely necessary and with the permission of the City Engineer, provided that this clause shall not operate in case of a gang organized for regular and continuous night work. In case any work is performed at night, the Contractor shall provide sufficient artificial light, in the judgment of the City Engineer, to properly prosecute the work.

**SUNDAY WORK:** No Sunday work will be permitted except in case of emergency, and then only with the consent of the City Engineer and to such an extent as he may judge to be necessary. The work to be done shall be under the general supervision of the City Engineer. At his discretion, he may from time to time direct the order in which and points at which the work will be prosecuted, and

may exercise such general control over the conduct of the work at any time or place as shall be required, in his opinion, to safeguard the interests of the City. The Contractor shall immediately comply with and follow any and all orders and instructions given by the Engineer in accordance with the terms of this contract, but nothing herein contained shall be taken to relieve the Contractor of any of his obligations or liabilities under this contract.

**ACCESS TO WORK:** The Contractor shall furnish proper facilities, by means of ladders or otherwise, to secure convenient access to all parts of the work, as may be required by the City Engineer.

**SPIRITUOUS LIQUORS:** The Contractor shall neither permit nor suffer the introduction or use of spirituous liquors upon or about the work [12] herein contemplated or upon any ground occupied by him in the prosecution of the herein required work.

**SANITARY CONVENIENCES:** Necessary conveniences will be constructed by the Contractor where needed for the use of laborers on the work, and their use shall be strictly enforced. The Contractor shall obey and enforce such sanitary regulations as may be prescribed by the Board of Health.

**OFFICE AND TELEPHONE:** The Contractor will construct on the work where directed by the City Engineer, a suitable office equipped with a table not less than three (3) feet wide by six (6) feet long; three chairs, a set of the plans and specifications. Telephone instruments connected with local and long distance telephones will be installed



therein and maintained at the expense of the Contractor.

Representatives of the Board of Public Works and the City Engineer, are to have the free use of this office and telephone.

**CO-OPERATION:** The Contractor shall co-operate with all other contractors who may be employed by the Board of Public Works on construction work in or on the streets in which the herein proposed work is to be performed, and he shall so conduct his operations as not to interfere with the work of other contractors or workmen employed by the Board of Public Works. He shall promptly make good, at his own expense, any injury or damage that may be sustained by the work of other contractors or employees of the Board of Public Works at his hands.

Any differences or conflicts which may arise between the Contractor and other contractors or the workmen of the Board of Public Works in regard to their work shall be adjusted and determined by the City Engineer. The Contractor shall suspend any part or all of the work herein specified or shall carry on the same in such a manner [13] as may be prescribed by the City Engineer, when the City Engineer considers such suspension or prosecution of the work necessary in order to facilitate the work of other contractors or workmen and no damage or claim by the Contractor will be allowed therefor other than an extension of the time specified in this contract for the completion of the work, for such a period of time as the City Engineer shall



certify in writing that the Contractor has been, in his opinion, delayed in the final completion of the work by reason of the work of other contractors or workmen.

The Contractor shall be held liable for any damage or delay to other contractors which may be caused by unnecessary delay or carelessness on his part.

**PROTECTION OF THE WORK AND THE PUBLIC AGAINST DAMAGE:** The Contractor shall protect his work and materials from damage due to the nature of the work, the action of the elements, the carelessness of other contractors, or from any other cause whatsoever, until the completion and acceptance of the work. Should any such damage occur, he shall repair it at his own expense, and leave the work to the satisfaction of the Board of Public Works in every particular. Neither the Board of Public Works nor any of its agents assumes any responsibility for collecting indemnity from the person or persons causing damage to the work of this Contractor.

The Contractor shall assume all responsibility for damage, arising from or in consequence of the execution of his contract, to adjoining work or property, the streets, sidewalks, mains, pipes, wires, poles or any other structures, interest or persons whatever, during the progress of the work contracted for, and shall furnish all guards, walks and lights and take all necessary precautions to prevent such damage.

**REMOVAL OF RUBBISH:** During the progress of the work the Contractor shall remove, upon de-

mand, such refuse material resulting from his [14] work or resulting from the work of other contractors as the City Engineer may direct. No additional allowance will be made for this work in the final estimate.

**CONNECTIONS WITH PROPOSED SEWERS:** The Board of Public Works shall have the right to discharge sewage into, connect any sewer or sewers with the sewer or sewers herein proposed, and no extra allowance will be made the Contractor in the final estimate on account thereof, and it is mutually agreed and understood that the making of such connection or connections and the discharge of sewage therefrom into the sewer or sewers herein proposed shall not be construed as an acceptance of any part of the work contracted for.

**SEWERS TO BE CLEANED:** During the progress of the work and until the entire completion and final acceptance thereof, the sewers, connections and their appurtenances are to be kept thoroughly clean throughout and left clean. If, in the final inspection of the work herein proposed, any obstruction or deposit is discovered in the sewers, appurtenances or any of their connections constructed under this contract, it shall, upon demand by the City Engineer, be removed at once by the Contractor.

**CONTRACTOR TO INFORM HIMSELF CONCERNING UNUSUAL DIFFICULTIES:** The Contractor is directed to inform himself, by carefully examining the location of the work and by such other means as he may prefer, as to the character and respective amounts of all the classes of material



that may be encountered in doing any excavating that may be necessary for the proper prosecution of the work herein contemplated and also of the amount of storm water, ground water and sewage he will be required to pump, bail or otherwise remove. He is also directed to make a special exhaustive inquiry at the office of any person or persons owning, controlling or operating any system or systems of railways, pipes, conduits, wires or any other structures that may be [15] on, over or under the surface of the street or streets along which the proposed work is to be done, and to determine, to his satisfaction, the character, size, location and length of such system or systems of railways, pipes, conduits, wires, structures, etc., and the extent that they will increase the expense of performing the work herein proposed, and to inspect the public records of the various City Departments having cognizance or control of systems of railways, pipes, conduits, sewers, wires or any other structure or structures that may be on, over or under the surface of the streets, and he is hereby directed to include in the unit price that he bids for the various portions of the work herein proposed, any and all expense he may be put to because of the existence and handling of any difficult or unusual classes of material, unusual amounts of storm water, ground water, and sewage in performing any part of the work herein contemplated and because of any additional work or delay that may be caused directly or indirectly by any or all of the hereinbefore mentioned or any other obstructions, and it is clearly understood that the



Board of Public Works does not insure the accuracy of any of the before mentioned records, reports or information and the Contractor agrees not to make any claim against the City and County of San Francisco or any of its officials or employees for any damage, extra work or expense caused by unforeseen difficulties of construction or occasioned by his relying upon any such records, reports or information, either as a whole or in part, furnished by any City Department, official or employee, or by any Company.

**CHANGES AND EXTRAS:** The Contractor shall do any and all extra work necessary for the proper construction or completion of the whole work herein contemplated that may be ordered by the Board of Public Works, in accordance with the provisions of Resolution No. 1246 (Second Series), of the Board of Public Works, and as full compensation for such extra work the Contractor shall accept an amount [16] equal to the actual cost of the work estimated by the Board of Public Works plus twenty (20) per cent for profit. In estimating the cost for extra work no allowance will be made for the use of tools, plant, or for general superintendence.

**ALTERATIONS:** The Board of Public Works, by resolution, may order alterations in the amount or dimensions of the work herein contemplated or any part thereof, either before or after the commencement of construction.

If said alterations increase the amount of concrete, reinforcing steel or excavation required to complete the work, the Contractor shall accept as full com-

pensation for such increase in material and labor, the following amounts:

For each such cubic foot of concrete completed in place.....	\$0.25
For each such pound of reinforcing steel in place .....	\$0.04
For each such cubic yard of excavation, including such additional or extra shoring, bracing, pumping and draining that said excavation may necessitate.....	\$0.75

In case said changes decrease the amount of concrete, reinforcing steel or excavation required by the plans, the price bid by the Contractor for doing the work herein required shall be decreased in the final settlement by the following amounts:

For each cubic foot of concrete less than required by the plans.....	\$0.25
For each pound of reinforcing steel less than required by the plans.....	\$0.04
For each cubic yard of excavation less than required by the plans.....	\$0.75

If such alterations diminish the quantity of work or materials of a class for which there is no price established in the contract, there shall be deducted from the contract price an amount equal to the actual cost of the work not performed, as estimated by the City Engineer, plus fifteen (15) per cent of said actual cost. In estimating the cost of work not performed no allowance will be made for the use [17] of tools, plants, or for general superintendence and the Contractor shall make no claim for damages because of anticipated profits on any work



that may be dispensed with.

In case such alterations increase the amount of work or materials of a class for which there is no price established in the contract, the Contractor shall accept as full compensation for such additional work an amount equal to the actual cost of the additional work as estimated by the City Engineer, plus fifteen (15) per cent for profit. In estimating the cost of additional work, the City Engineer will make no allowance for the use of tools, plants or for general superintendence.

**TERMINATION OF CONTRACT:** All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the Contractor shall be deemed a breach of the contract.

Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due



to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract.

**MEASUREMENTS, ETC.:** In estimating and allowing quantities, all lengths will be based on horizontal measurements. [18]

Main sewers will be measured along their center lines, from center to center of manholes.

Side sewers and culvert pipes will be measured from the bell of the slant of the T branch.

No extra allowance will be made for slants, future pipe sewer connections or culvert connections in the masonry sewers.

No extra allowance will be made for closing openings in existing brick sewers with brick work.

All cut-offs from piles are to be the property of the Contractor and no allowance will be made for the portion of the pile above the cut-off.

**PRICE TO COVER:** In naming a price for performing the work of constructing any of the herein described sewers and structures, bidders are directed to include in said price the cost of completing the sewer or structure, together with the cost of removing the existing sewers from the streets wherein the new work is proposed, or opening and filling them with sand and removing and disposing of their contents, as ordered by the Board of Public Works, the cost of excavating, lagging or shoring and bracing, draining, refilling, disposing of surplus material from and removing and restoring the pavement over

such excavations as are necessary and maintaining such property of public service corporations and underground structures as may be encountered in the performance of said work, as no additional allowance will be made in the final estimate for performing any of the above named work.

**HOURS OF LABOR:** In the performance of the herein proposed work, eight (8) hours shall be the maximum hours of labor on any calendar day.

**AMOUNT OF WORK ESTIMATED:** The amount of each class of work has been preliminarily estimated as follows, and this estimate will be used as a basis for comparing bids. The Board of Public Works does not expressly [19] or by implication agree that the actual amount of work will correspond to said estimate, but reserves the right to increase or decrease the amount of any class or portion of the work as is in its opinion to the interest of the City and County of San Francisco.

**BASIS OF FINAL PAYMENT:** Final payment will be made on the basis of the amount of each class of work actually done in accordance with the specifications and to the satisfaction of the Board of Public Works. [20]

**[Certificate of Referee in Bankruptcy to Part of Specifications Called "General Provisions."]**

I, Armand B. Kreft, Referee in Bankruptcy, to whom the Matter of Metropolis Construction Co., Bankruptcy, #6827, in the District Court of the United States for the Northern District of California, was referred, do hereby certify the foregoing to be a full, true and correct copy of that part of



the specifications called "General Provisions," which are annexed to and made part of the contract between the Metropolis Construction Co., and the Board of Public Works of the City and County of San Francisco, State of California, dated July 22, 1910, and which are annexed to the claim of Paul I. Welles, filed in my office in said District Court of the United States, in the Matter of Metropolis Construction Company, a Corporation, Bankruptcy, No. 6827, now remaining on file and of record in my office.

ATTEST my hand, this 28th day of April, A. D. 1914.

ARMAND B. KREFT,  
Referee in Bankruptcy.

**[Certificate of Clerk U. S. District Court to Copy of  
Certified Copy of That Part of Specifications  
Called "General Provisions," etc.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed twenty pages, numbered from 1 to 20, inclusive, contain a full, true and correct copy of a certified copy made by A. B. Kreft, Referee in Bankruptcy, of that part of the "Specifications" called "General Provisions," annexed to the contract between the Metropolis Construction Co. and the Board of Public Works of the City and County of San Francisco, dated July 22, 1910, and which specifications are annexed to the claim of Paul I. Welles, in the Matter of the Metropolis Construction Co.,



No. 6827, in Bankruptcy, as the same now appears on file and of record in my office, in case No. 15,148, Paul I. Welles, Complainant, vs. John Daniel, Trustee of the Estate of Metropolis Construction Co., a Corp., Bankrupt, Portuguese-American Bank of San Francisco, a Corp., and Thomas F. Boyle, Defendants.

I further certify that said Armand B. Kreft, Esq., is a duly appointed Referee in Bankruptcy of this court, and that the bankruptcy matter of the Metropolis Construction Co. herein referred to was duly referred to and is now pending before said Referee.

I further certify that the costs of preparing and certifying the foregoing is the sum of Ten Dollars (\$10), and that the same has been paid to me by the attorney for the Portuguese-American Bank of San Francisco, a corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 8th day of May, A. D. 1914.

[Seal]

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk.

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[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Supplemental

Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed May 8, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.







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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES, and JOHN DANIEL,  
Trustee of Metropolis Construction  
Company (a corporation), Bankrupt,  
*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO (a corporation),  
*Appellee.*

## BRIEF FOR APPELLANTS.

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### Statement of the Case.

(Numbers in parenthesis refer to pages of the transcript.)

(The italics in this brief are by counsel for appellants.)

In December, 1910, the Metropolis Construction Company, a corporation, made a claim upon the City and County of San Francisco for the amount of a payment which it claimed to be due under the terms of its contract with the city for the construction of sewerage at Fourth and Kentucky streets, \$6,830.85. This claim or demand was ap-



proved by the board of public works. On the day of its approval by the board of public works, the company presented a certified copy of the resolution approving the claim (together with two others, all amounting to about \$38,000.00), to the Portuguese-American Bank of San Francisco, together with a paper addressed to the city auditor, notifying him that the bank was authorized and empowered to draw the warrants for the amounts (pp. 138 and 139). On that day the bank loaned the construction company thirty thousand (\$30,000) dollars and followed it the succeeding day with an additional five thousand (\$5000) dollar loan. No notice was given the city treasurer, or board of public works, or any other official of the City and County of San Francisco, except the auditor, either by or on behalf of the bank or the construction company until after December 15, 1910, namely, December 17, 1910 (p. 143); nor were the claims approved by the board of supervisors or the mayor of the city until after that date, namely, January 3 and 4, 1911 (p. 145 and 216). The demands themselves did not reach the auditor's office until January 5, 1911 (p. 219). *No consent whatever* to any assignment was obtained nor given as required by the contract (pp. 137 and 146).

The procedure is that

“all demands of this kind, after being approved by the board of public works, the board of supervisors, and the mayor, are received by the auditor and by him delivered to the person shown to be entitled thereto; who takes the

same to the city treasury, there receiving the cash and leaving the demand, after signing his name in the back thereof under the words 'Received payment', printed upon the demand" (p. 144).

While the bank claims it had authority to physically receive the demands for the fourth progress payment from the auditor, *if and when* they should come to the auditor's office and have received the approval of the auditor, still it is admitted that these demands, *if and when* they should be so received, *would remain in the name of and payable to the construction company*, the alleged assignor, and *would require the signature of the construction company*, the alleged assignor (under the words "Received payment" printed upon the demand).

The referee finds it a fair inference that the individuals who were parties to the loan at the bank intended (in their minds) that some officer of the construction company should do this. But the construction company, nor any of its officers, did not give or make any promise, either orally or in writing, to do this, and consequently the bank had none—no authority whatever to demand or receive the cash from the city treasurer, either in its own name or in the name of the construction company. And this was the legal situation of the parties (at least so far as these appellants are concerned), regardless of what *inexpressed intention* they might have had or that might reasonably or unreasonably be inferred.

*In other words, the bank was in such a position that it would have had to demand and necessarily receive the intervening act (willingly or unwillingly) of the officers of the construction company before it could demand the cash from the city treasurer.*

*The assignee could not get the money without the further intervention of the assignor, whose consent to intervene would have to be obtained willingly, or, if not, then the bank might try some other way, a lawsuit, perhaps. But such intervention, mediately or immediately, of the assignor, the alleged assignee would have to have in the situation as created by the parties themselves, or it could never get the money from the fund holder, the city treasurer.*

The charter of the City and County of San Francisco then in force, provided (Art. 11, Chap. 1, Sec. 19) that all demands payable out of the treasury must be first approved by the board of supervisors *before they can be approved by the auditor or paid by the treasurer*; that all demands for more than two hundred dollars shall be presented to the mayor for his approval, and all resolutions directing the payment of money, other than salaries or wages, when the amount exceeds five hundred dollars, *shall be published for five successive days, Sundays and legal holidays excepted, in the official newspaper (p. 21).*

The contract of the construction company with the city provided that it could not, *either legally or equitably*, assign any moneys payable thereunder



or its claim thereto without the consent of the board of public works (p. 137). This consent the construction company and the bank neglected to obtain, and it was never given by the board of public works as required by the contract (pp. 137 and 146)!

The Metropolis Construction Company did not execute any paper which in terms purported to assign either its contract or any payment thereunder to the bank, but only a letter notifying the auditor that the bank was thereby authorized and empowered to draw the warrants *in favor of the construction company* (p. 139).

The construction company's claim against the city was made *in its own name* and remained that way until the warrants were issued in January, 1911; and, when these warrants were issued, they were also issued as *payable to the construction company* (p. 147). Neither the demands for the fourth progress payments nor the warrants therefor are in the name of the bank, nor does it hold any authorization or power to endorse the construction company's name or to receipt for the payments, so that the transaction, in order to inure to the benefit of the bank, as a matter of law, *required the signature of the construction company* by some properly authorized officer.

And that was the way the cashier of the bank understood it. He testified (p. 249): "I had no other paper on this particular loan from the Metropolis Construction Company, outside of the note

and this assignment," referring to the resolutions of the board of public works and the notice to the auditor as an "assignment."

And again (p. 253), the cashier testifies (referring to a similar paper, used once before on an occasion when no lien holders objected): "The paper itself, the demands, were made out in the name of the Metropolis Construction Company," saying, in this connection, moreover, that this paper gave him authority to receive the *money, which is the very thing that it did not do*—the very authority the bank *never had*.

On December tenth (p. 149), and fifteenth (p. 150), 1910, Paul I. Welles, appellant, who was a sub-contractor of the Metropolis Construction Company, gave notices to withhold under Section 1184 of the Code of Civil Procedure, which were forthwith duly served by him on the board of supervisors, the mayor and the city auditor and treasurer. (Section 1184 of the Code of Civil Procedure of the State of California, as it stood at the time these notices were served, is printed in the argument, later on in this brief.)

Immediately after this, December seventeenth and nineteenth (p. 143), the bank gave notice to the board of works, the board of supervisors and city auditor, of its claimed assignment; and, on January 4, 1911, to the city treasurer. In the meantime, however, and on December 19, 1910, a petition in bankruptcy against the construction company was filed in the United States District

Court, and the construction company was thereafter duly adjudicated a bankrupt.

The appellants are the sub-contractor, Paul I. Welles and the trustee of the bankrupt's estate, which will have to regard Welles as a general creditor unless he be successful here; but would not have so to regard the bank, which has neglected to file any claim in bankruptcy.

The proceeding is a controversy arising out of the settlement of a bankrupt estate.

On October 14, 1911 (p. 92), a report was filed by the referee. The referee was ordered (p. 92) "to hear the testimony and find the facts upon all issues made by the pleadings," but his report shows that (p. 93) the pleadings did not include an *answer* by the bank, at that time, and the hearing was really upon the order to show cause and returns thereto.

In this report of October 14, 1911, the referee made findings of fact.

While the cause was subsequently sent back to the referee twice and that officer sent in a report, March 8, 1912 (p. 120), asking for further instructions and a final report, July 16, 1912 (p. 132), it is a fact that the facts found in the report filed October 14, 1911, *have never been subsequently altered, enlarged, diminished or amended.*

This report was confirmed without objection. But, it being only on an *order to show cause*, the opinion and order thereon made December 12, 1911



(p. 114), were not strictly followed and the cause was sent back to the referee by order of December 26, 1911 (p. 119), to find the facts upon the issues arising upon the pleadings, *which were then complete*.

The referee, however, seemed to consider the former findings of fact, as confirmed, *res adjudicata*, and so reported to the court on March 28, 1912 (p. 121), asking for "instructions as to further proceedings, if any" (p. 124).

The court did not consider the former findings (on the order to show cause) *res adjudicata*, and ordered the referee to *ascertain* and report "the facts" without reference to them (p. 128).

The final report of the referee was pursuant to this order and was filed July 16, 1912 (p. 132). In this final report the *facts* found *are the same* as the *facts* found in the report of October 14, 1911, upon which the court concluded a decree should issue for the complainant as prayed, *and so ordered*.

The referee says no additional evidence was introduced on this third and last reference (p. 133), but "this cause was submitted to the referee upon the record as made upon the order to show cause and upon the previous reference \* \* \* dated December 26, 1912" (the second reference).

Looking at the report made on the second reference we find that while some additional evidence was taken (by stipulation, no witnesses being sworn pp. 263-272) the referee finds that the addi-

tional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the court in its said memorandum of opinion'' (p. 124) and ''finds the facts upon the issues arising upon the pleadings to be as reported by him in his former report, together with the additional facts set out in this report'' (p. 123)—which are the additional facts found by him not to raise any new question nor affect the rights of the parties.

So when the cause was submitted finally to the court (Dietrich, J.) the *findings of fact* were *identically* those facts found in the referee's report of October 14, 1911, confirmed by the court (DeHaven, J.) December 12, 1911, wherein a decree was ordered for complainant on December 12, 1911 (p. 114).

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#### QUESTIONS INVOLVED.

FIRST QUESTION. Did the court err in making a decree herein that the defendant, Portuguese Bank of San Francisco, has a good and valid assignment of the fourth progress payment on the Fourth and Kentucky street sewer contract, and is the owner thereof entitled to have and possess the same and the money due and payable under the demand therefor; and in not holding that said fourth progressive payment was not assigned, for the reason that the alleged assignment is void because of failure to obtain consent as required by the contract?

SECOND QUESTION. Did the transaction between the construction company and the bank, in December, 1910, constitute an assignment by the construction company to the bank of the fourth progress payment on the Fourth and Kentucky street sewer contract?

THIRD QUESTION. If so, was the fourth progress payment *matured* on December 15, 1910, so that the construction company could demand immediate payment; and, *if not*, did the appellant Welles obtain a prior right thereto by his notices to withhold under Section 1184 of the Code of Civil Procedure, served December 10 and 15, 1910?

FOURTH QUESTION. Did the opinion and order of the court that a decree be made in favor of complainant as prayed, made December 12, 1911, upon the facts found by the referee in his report filed October 14, 1911, become the *law of the case* and fix the right of the complainant to the relief so ordered, in view of the fact that the record submitted on final hearing discloses that the facts as they are stated in the referee's final report filed July 16, 1912, remain in all respects as they are stated in his former report of October 14, 1911, upon which said decision was made and decree for complainant ordered?

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APPELLANTS' POSITION.

POINT. 1. Appellants' position is that the court erred in giving and making a decree herein, that



the defendant, Portuguese-American Bank, has a good and valid assignment of the fourth progress payment and is entitled to have possession of the money due and payable under the contract, and in not holding that the payment in question was not assigned to the bank for the reason that the contract, by its very terms, provides that *the contractor shall not, either legally or equitably, assign any moneys payable under this contract, or his claim thereto, unless with the consent of the board of public works* (p. 137), and that the alleged assignment is, therefore, legally void.

POINT 2. Appellants contend that the transaction between the respondent bank and the construction company did not amount to an assignment.

POINT 3. Appellants contend that, even if it did amount to an assignment, the fourth progress payment was not *matured* at the time so as to prevent the sub-contractor's lien under Section 1184 from attaching as a prior right to the fund; and

POINT 4. Appellants contend, upon the coming in of the report of the referee on the 16th day of July, 1912, it *then* appearing that no further evidence had been offered, *and no new findings of fact made*, the former adjudication of December 12, 1911, upon findings thus remaining undisturbed (that complainant Welles was entitled to a decree in his favor, as prayed) appeared conclusively to be *the law of the case*, from which neither the referee nor the trial court had any right to depart;

that an adjudication, solemnly declared by one judge on the facts then before him in a case ought not to be subject to alteration (the facts remaining the same) by every new judge who subsequently may sit in the cause, but only upon a different state of facts subsequently appearing, otherwise a litigant might be buffeted by judgments both for and against him *upon the same facts in the same court and cause*—INTOLERABLE AS A THEORY OR CONDITION.

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#### RESPONDENT'S POSITION.

Respondent's position is simply based on the reasoning of the referee's opinion, to the effect that the transaction between the construction company and the bank amounted to a legal assignment, that the assignment was not void for failure to obtain consent, that provision in the contract being merely for the protection of the city, and that the payment in question was matured at the time so as to give the assignments priority over any notice to withhold made subsequently and before the demands were approved by the board of supervisors or the mayor.

As to the fourth point, neither the respondent, nor the lower court in its opinion, has offered any reason or authority in refutation.

Concerning the opinion of the learned judge of the district court, it is to be observed that he erroneously bases his opinion upon the fact that

the city authorities were never formally or specifically advised of the rights of the plaintiff until Welles gave his notice to withhold (p. 185). The finding of the referee upon this point is (p. 137) "that Mr. Welles acted as sub-contractor *with the knowledge of the board of public works* and of its inspector of the job *all the time*, openly and without any concealment; that he had his name in the telephone book and he had his sign 'Paul I. Welles' as sub-contractor on the job." Is Mr. Welles to be *penalized* for not giving a *formal* notice, then, of something the board actually *knew* "all the time"? The conclusion of the court that he should be is not a correct legal or equitable conclusion; nor is any laches imputable to Welles on that account.

The question of laches dwelt upon by the court in its opinion was neither raised nor discussed by either party in the court below. If the court had gone sufficiently into the record, he would have discovered that the respondent could not have raised such a question, for the reason that the claim of Mr. Welles had been duly filed and approved in bankruptcy as a secured claim against the bankrupt's estate that this was a final judgment as to its merits and validity (the time to object having expired), and that, while the respondent bank might have been in the position before adjudication to urge laches or neglect against Welles as the reason why the claim should not be approved, if it had chosen to appear in the bankruptcy proceedings, it was in no such position at any time thereafter, and



certainly not at the time the question was submitted to the court below for its decision.

Also that by reason of the fact (p. 137) that Welles acted as sub-contractor *all the time*, with the knowledge of the board of public works and its inspector on the job, that board would be estopped, as between it and Welles, from claiming that it had not given its consent.

This is a cause which had been before the court two or three times and had been fully argued and elaborately briefed before Judge DeHaven and which it is respectfully submitted the judge who finally approved the referee's legal conclusions had not the opportunity fully to become acquainted with.

The notices to withhold were either within time or they were not within time under Section 1184, C. C. P. If they were within time no laches is imputable to Welles.

The argument with reference to laches also is met by the answer that if the bank had inquired at the board of works they would have found that Welles was a sub-contractor because he was such *with the knowledge of that board and its inspector*, and had his sign on the works (p. 138). But the bank made no inquiry whatever at the board of works.

The other objection is met by the answer that Welles had an unquestioned right to give the notices any time before the *last* payment was *matured*; and that it was the only sane and safe course for him,

as a business man, to pursue; because, a notice given by him at the beginning of work would naturally arouse anger and condemnation on the part of the contractor. Appellants venture the belief that the court will agree with them that a sub-contractor pursuing a course of filing stop notices with the owner as soon as he received a sub-contract, would become unpopular and lose business on that ground alone. How long, we respectfully ask, would a sub-contractor succeed in doing business were he to serve a stop notice on the owner as soon as he entered upon the performance of his sub-contract? What sort of business confidence would such a procedure, if generally adopted, manifest on the part of sub-contractors? How long could contractors do business with such people? How long would they continue to do so? Manifestly, the better construction of the statute is that no laches is to be imputed to anyone who does not file a stop notice at the beginning of his employment as a sub-contractor or material man, provided he does so within any time before payment is matured or immediately payable. Such a "cash in advance", "stand and deliver" method of transacting business might be strictly legal, but it would not be tolerated in any American community. Mr. Welles did not obtain *formal* consent to the sub-letting of the contract to him, but this was with the full knowledge of the board of public works (p. 137), who would be presumed to have consented under the circumstances; besides which, before this suit was brought Mr. Welles'

secured claim in the bankruptcy proceedings had been filed and allowed (p. 150).

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#### SPECIFICATION OF ERRORS.

1. The errors upon which appellants rely in praying this court for a reversal of a decree of the lower court overruling appellants' exceptions and confirming the referee's report and which are more particularly stated in their respective assignments of errors (pp. 192-205) may be classified under the following larger headings:

#### I.

The court decided (p. 152) that the alleged assignment in favor of the bank was not void because of failure to obtain consent; that such a provision is for the protection of the city and can only be invoked by the city, and that the bank was entitled to have the money as against the rights of the trustee in bankruptcy.

Appellants contend that the court erred in not holding that the payment in dispute was not assigned and in holding the bank to be entitled to the money, and that the court should have held the trustee in bankruptcy and, also, Welles to have the better right thereto, than the bank; for the reason that the alleged assignment is legally void for failure to obtain consent; and in overruling appellants' exceptions, in that behalf, to the referee's report (Assignments Nos. 1, 6, 10, 16, 17, 19, 23, 24; Excep-



tions Nos. 6, 7, 8 and 11, pp. 175-177; Exceptions Nos. 1, 2 and 3, pp. 180 and 181).

## II.

The court decided that an assignment arose in favor of the bank, December 5, 1910.

Appellants contend that the evidence is insufficient to sustain the finding of the existence of such an assignment and that as a matter of law, no such assignment could be held to exist; that the court therein erred, and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 4, 6, 7, 8, 12, 13, 14, 15 and 17; Exceptions Nos. 5, 8, 9, 13 and 14, pp. 176, 178 and 179; Exceptions Nos. 1 and 3, pp. 180 and 181).

## III.

The court decided that the fourth progressive payment in controversy became due and was matured on December 5, 1910 (p. 159) and that the notices to withhold made by Welles on December tenth and fifteenth, 1910, were subject to a prior right acquired by the bank on the fifth day of December, 1910, by its alleged assignment.

Appellants contend that under Section 1184 of the Code of Civil Procedure, as construed by the Supreme Court of California in the case of *Newport & Co. v. Drew*, Mr. Welles obtained a prior right; that the court therein erred and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 2, 3, 5, 9, 10, 16 and

18; Exceptions Nos. 2, 3, 4, 5, 10, pp. 173, 174 and 177; Exceptions Nos. 1 and 4, pp. 180 and 181).

#### IV.

The court decided that the findings and report of said special master and examiner, and the order of the court confirming the same of December twelfth, 1911, and ordering a decree for the complainant, Welles, as prayed, did not become conclusive as the law of the case upon it subsequently appearing that no new facts were found.

Appellants contend that the opinion and order of December 12, 1911, is conclusive as the law of the case, and fixes the right of complainant Welles to have entered a decree in his favor in the absence of new or changed facts or findings of fact in the referee's final report; that the court therein erred, and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 11, 19, 24 and 25; Exception No. 12, p. 177 and No. 1, p. 180).

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#### Discussion.

##### ON BEHALF OF APPELLANTS.

For convenience appellants wish first to discuss their point numbered four.

In this case, on December 12, 1911, the facts had been found on hearing before the referee of an order to show cause. The report of the referee had been filed October 14, 1911 (p. 92).

This report was confirmed *without objection* and the court (December 12, 1911) *concluded* complainant entitled to a decree and so ordered (p. 114). There was a memorandum opinion and a minute order to this effect.

On December 18, 1911, however, the court (p. 119), the first hearing having been upon an order to show cause, only, ordered the cause back to the referee for *final hearing*.

On March 8, 1912, the referee made his report showing the *whole record* of the former hearing on the order to show cause to have been admitted (pp. 122 and 263) in addition to certain stipulations and documentary evidence (p. 122). Then the referee merely re-affirmed the findings of fact in his former report in addition to such admissions (p. 123) and informs the court that "the additional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the court in its opinion of December 12, 1911 (p. 124), and treats that opinion and order as *res adjudicata* as to the facts found, and asks for instructions (p. 124).

This opinion of the referee was evidently based upon the rule that:

"When the case is heard on facts found by a referee to whose findings of fact there is no objection filed, *the findings of fact are conclusive* (Equity Rule 83); and, when the case is decided on such facts, then it is a final disposition of the cause."

In re Royal, 7 A. B. R. 638 (N. C. Jan. 27, 1906).



Appellants here, however, do not find it necessary to take the view suggested by the referee that these findings of fact were *res adjudicata*, but, on the contrary, regard the action of Judge DeHaven in sending the cause back to the referee with instructions to *ascertain the facts* and report his conclusions regardless of the former report, as correct, because the first hearing had been only upon an order to show cause and, therefore, it was right to give the bank an opportunity to bring in any new or additional evidence it might have on a final hearing to aid its claim of an "assignment", for the reason that the findings and conclusions upon the order to show cause *might* be changed upon final hearing, *if the facts then should appear to be different*. The bank excepted to this second report on the ground, among others, that the former confirmation was not *res adjudicata* as to the facts (p. 126) and asked that the court re-refer the cause to the referee to report his findings and conclusions (p. 127). Thereupon the court, on April 15, 1912, evidently considering the bank should have an opportunity to produce further proof on *final* hearing, if it had any, returned the matter to the referee and instructed him to "*ascertain and report*" the facts and his conclusions of law therefrom without reference to the former confirmation (p. 128); thus, in effect holding that confirmation not to be *res adjudicata* as to the facts found, but expressly giving either party a *chance* to introduce *further proof on final hearing*.

*This, however, the bank did not do.* Neither did any party to the action do so. *No additional evidence whatever was taken* (p. 133), but the final report of the referee was made upon the record as it stood *prior to the reference of April 15, 1912* (p. 132), namely, according to the findings of October 14, 1911, upon which the decision and order of December 12, 1911, had been made.

Admitting that the bank was right in its position that the decision of December 12, 1911, was not *res adjudicata* and that it should have been given an opportunity to produce further proof, the appellants' contention is that the opinion of December 12th appeared as the *fixed law of the case* when it subsequently appeared, as it did appear, that the parties did not offer any new or additional facts in evidence when the matter was returned to the referee, but submitted the cause on the record as it then stood.

The finding of the referee on this point will be taken as conclusive. It is (p. 133): "No additional evidence being introduced under the reference of April 15, 1912", etc. The report of the referee, filed July 16, 1912 (p. 132), where this finding is made, states in addition that the cause was submitted to him "*upon the record as made, upon the order to show cause*" (namely, October 14, 1911) "and upon the *previous reference* to the referee to make findings of fact."

In other words, the referee acting upon a record and upon findings of fact as it stood on October

14, 1911, as confirmed by the decision of December 12, 1911, when the court ordered the decree on said facts as prayed by the complainant, merely re-stated the *same facts* in his final report and took the occasion of stating his opinion of the law contrary to the previous opinion and adjudication by the court, on those very same findings of fact!

The question whether the findings of fact confirmed by the opinion and order of December 12, 1911, became *res adjudicata*, or not does not enter into this discussion. The issue is of greater import than that, because unless the law of the case, apparent from an opinion and solemn order of the court made and filed at one stage of the case, be stable, unchangeable, upon the facts as they appeared when the order was made, *in the absence of additional findings of fact*, or any material change in the record, the cause of civil justice rests upon no sure foundation, but may truly be said to be shifting as the sands of the sea, and *without order!* in the absence of which there can really be no law!

The report, as confirmed by the order of December 12, 1911, was, however, *the law of the case at that time* ON THOSE FACTS. And when, on the coming in of the *final* report, it appeared that these facts, so confirmed, remained absolutely unchanged, then, also, the decision of the court December 12, 1911, that *on those facts* the complainant was entitled to the relief demanded, and disbursements, remained firmly the law of the case and fixed the right of the complainant to a decree.



It was conclusive, under those circumstances, and the court erred in not so holding.

The ruling thus made became *the law of the case upon those facts*, because it was made after a full hearing of the facts and upon reported findings of the same which were not excepted to and had been confirmed.

It is proper and just that a solemn ruling made under such circumstances should be final in the absence of any change in the findings of fact or status of the parties.

Van Fleet, District Judge, announced the rule in a late case (July 25, 1911) in the Circuit Court for the Northern District of California, as follows:

“A careful review of the records submitted on final hearing discloses that the facts as they are stated are in all material respects fully sustained by the evidence taken before the master; and under those circumstances, it must be held, as contended by complainants, that the principles announced in that opinion as the basis of the order granting the preliminary injunction, *become the law of the case* in this court, *and fix* the right of the complainants to have the injunction made perpetual. *The ruling was not, as claimed by respondents, a purely tentative one*, like an ex parte order granting a temporary restraining order. *It was a ruling made in response to an order to show cause, and after a full hearing of the prima facie case made by the sworn bill and the affidavits of both parties; and, the showing then made being fully sustained by the evidence on the final hearing, the ruling becomes conclu-*

*sive, excepting only on review by an appellate court."*

Loewe et al. v. Cal. St. Fed. of Labor (No. 13764), 189 Fed. Rep. 714-715.

The principle announced by Judge Van Fleet in the Loewe case ought certainly to be carefully enforced. And on that appellants rest this branch of their case.

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#### ASSIGNMENT.

Concerning the matter of the assignment (appellants' first point) the appellants contend that the fourth progress payment was not assigned as a matter of law; that, therefore, the court erred in holding the bank to be entitled to the money and that the court should have held the trustee in bankruptcy and, also, appellant Welles to have the better right thereto for the reason that the alleged assignment is void because of failure to obtain consent as required by the contract.

The finding of the referee (p. 152) adopted by the court (p. 183) is:

"The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city."

The provision of the contract as found by the referee (p. 137) is that the contractor

*“shall not, either legally or equitably assign any of the moneys payable under this contract, or his claim thereto, unless with the like consent of the board of public works”* (p. 137).

and that,

*“the board of public works of the city has never given consent to any assignment to the bank of said contract or of the fourth progress payment upon said contract or any part thereof”* (p. 146).

The assignment was made to the bank, not only without the consent, but without knowledge of the party (the board of public works) whose consent was necessary.

It is not intended that the sections of the Civil Code doing away with whatever restrictions formerly existed upon the power of parties to assign ordinary contracts, should render null any agreement that the parties might make on the subject of assignment; and it may be made non-assignable, either by express language or by construction.

LaRue v. Groezinger, 84 Cal. 281, 283-286.

Inasmuch as this contract contained an express provision prohibiting the assignment of any money or any claim thereto unless with consent of the board of public works, the assignment claimed by the Portuguese-American Bank is absolutely null and void for the reason that no such consent was had or obtained.



“There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the Statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy.” \* \* \*

“The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company.”

Butler v. San Francisco Gas & Electric Co.,  
May 29, 1913, Civil No. 1053, Vol. 16, C.  
A. D. page 946, 949, 953; citing,  
Burck v. Taylor, 152 U. S. 635;  
LaRue v. Groezinger, 84 Cal. 281, and other  
cases there cited.

In the Burck case the contract contains a clause prohibiting any assignment without the consent of the state, and in discussing its effect the Supreme Court of the United States, through Mr. Justice Brewer, declared that it was a stipulation which was one of the terms of the contract and binding upon the contractor, *and equally binding upon all who dealt with him*. The contractor's assignee acquired no rights by an assignment.

*“No right to recover anything from the state.”*

That the parties to a contract may in terms prohibit its assignment *so that an assignee cannot*

*succeed to any rights in the contract by virtue of the assignment thereof to him* is held in the case of

Mueller v. Northwestern University (Feb. 1902), 195 Ill. Rep. 236; 63 N. E. 110; 88 A. S. R. 194,

approving the California case of LaRue v. Groezinger.

Therefore, the alleged assignment to the Portuguese-American Bank, in any event, is absolutely void for the reasons above stated.

The sub-contractor Welles is not in the same boat for the reason that the city acted in such a manner as to be estopped from raising objection to his acting as sub-contractor, although he did not obtain the consent of the board of works, as provided by the contract. It is so estopped in fact and as a matter of law, for the reason that the board of works might have refused to recognize him as sub-contractor or to have any dealings with him as such. It did not do so, however, but the plaintiff held on under the contract with the full knowledge of and without any objection from the board of public works (p. 137) and completed the contract. And under the receivers and the trustee appointed by this court Mr. Welles prosecuted the work continuously and to final completion (p. 149). He has received payments from the trustee in bankruptcy on account of the work (p. 149) and his accounts with the bankrupt have been settled and allowed (p. 150), seven thousand, two

hundred twenty-eight dollars and five cents (\$7,-228.05) remaining now due him. Under these circumstances it is immaterial that the city did not consent to the assignment.

See note to *Mueller v. Northwestern University*, 88 A. S. R. at page 205.

No consent, however, was ever obtained by the *bank* to the alleged assignment and no attempt whatever is made to show that the board of public works knew anything about it.

If the court should be of the opinion that the city or board of public works did not act in such manner as to be estopped from raising objection to the sub-contract of Welles and should be of the opinion that both Welles and the Portuguese-American Bank had, the one a void sub-contract, and the other a void assignment, *then the decree should be in favor of the appellant*, John Daniel, as trustee, whose right would be unquestioned, particularly under the amendment of 1910 to the national bankruptcy act, by virtue of which the trustee becomes "an execution creditor" (see assignment of errors No. 10, p. 194).



## POINT TWO.

Should the court be of the opinion the alleged assignment was not void, the contention (secondly) of appellant is that the finding that the parties intended an assignment is not legally justified by the evidence; that the evidence is insufficient to support that finding; and, that the court cannot say the facts amount to an assignment, as a matter of law.

If it be said that Chris Emille, the construction company's president, testified that he understood the notice to the auditor was "an assignment for the bank to draw the money from the treasury" (p. 141), the answer is that, that in itself, is not legally sufficient. The placing of a rubber stamp upon the notice signed by the construction company and addressed to the auditor (p. 141) is not, of itself, sufficient. The statements of Chris Emille and the bank that he intended the said notice, called an "order" by him, as a complete assignment (p. 141), are not of themselves sufficient. The production by Mr. Emille of copies of resolutions passed by the board of works making its preliminary approval of the claims of the construction company, is not of itself sufficient. All these things taken together are not sufficient—not unless we are willing, as the referee in his opinion seems to be willing, to override the principle of decision announced by the Supreme Court of the United States and followed in a recent Oregon case quite similar to this, concerning the indispensability of a *complete*

and *full* surrender of control, *and its execution*, in such cases.

There is one thing that is indispensable; one thing without which there cannot be an assignment; one thing without which there never has been one recognized by any court, without which no assignment ever can be recognized by any court, or inferred by any court; because, without it there can be no equity or good conscience in the claim of anyone that an assignment has been created by conduct, for the reason that his conduct, *in part*, is inconsistent with his claim.

Now, what is this indispensable thing?

*It is complete, full, absolute surrender of control* of all dominion over the property, or money, or thing, whatever it is, that is claimed to be the subject of an assignment. "*Surrender of control*," the books say. And they say it emphatically!

This surrender of control must be in such a manner that the holder is authorized to pay the amount directly to the creditor *without further intervention by the debtor*. Complete surrender of all control must have been made in such a way that the *treasurer* of the City and County of San Francisco, the *holder* of the *money* due or to become due to the construction company could pay the money directly to the bank without further intervention of the construction company, without the construction company, keeping any strings on it at all.

Now, what are the facts in the case at bar? There was a *notice* given *not by the bank*, but by the construction company to the city auditor that the bank “is hereby authorized and empowered to draw the warrants” (when issued) “*in favor of the*” *construction company*, and that notice was taken to the auditor’s office and returned to the bank. Nothing remained at the auditor’s office whatever and the auditor had not the warrants or claims at the time and did not receive any until about a month later, and after the construction company had become a bankrupt! The warrants were not in existence at the time the notice in question was taken to the auditor’s office. The notice, even, was not left there, but was brought back to the bank (p. 141).

The so-called order was never accepted by the auditor; it was merely carried to his office and a rubber stamp with the initials of one of his clerks placed thereon (p. 248). The bank cashier testified:

“And Mr. Emille in some way he got this stamp on from the auditor’s office—‘Received Auditor’s office December 6, 1910’, and brought it back to me, and thereupon they gave us a note for \$30,000.00.”

No notice was given the board of public works; none to the mayor’s office; none to the city treasurer, *the holder of the money*; nothing whatever done (until December 17, 1910) by way of notice to anyone, except the notice taken to the auditor’s office *and taken away again immediately*.



No transfer of title to the claims or warrants made in any way whatever, and the claims or demands remained in the name of, *payable to*, THE CONSTRUCTION COMPANY!

No power of attorney was given to the bank or to anyone to sign or endorse that name and *that power therefore remained in the construction company.*

In the notice or writing given to the bank nothing is stated about any loan or assignment or consideration, nor is the power expressly made irrevocable. Nothing on that subject is stated.

Therefore, as the record stands, the bank received power as agent of the construction company to receive the warrants, when they should arrive in the auditor's office and be approved by him. It had no authority to act in its own name. Whatever there was to do, or receive, under the power given in the notice to the auditor was to be in the name of the construction company. The bank was given authority to draw the warrants "in favor of the undersigned" (page 139); and the collection, if and when made, was to be made in the name of the construction company. This is a fair inference from the testimony, the referee finds (p. 161):

"However, it is a fair inference from the testimony that it was intended by the parties that the method followed in the previous transaction would be followed upon the collection of said demands, that is, that when the warrant was ready for delivery *some officer* of the company would endorse the same in the same manner as upon the previous loan."

The referee also says (p. 162) that it was not the "intention" of the company to reserve any right for its own use or benefit, or at all, either to revoke the order on the auditor or to collect the money. *But there is not a scrap of testimony in the record to support this finding!* On the contrary, the record indisputably shows that the company *did* reserve such a right, no matter what its "intention" may have been (because it had it and did not part with it in any manner).

On the contrary, also, the testimony of the cashier of the bank who made the loan shows that he fully understood that this was the only effect the notice had:

"The warrants were *made out in the name of the Metropolis Construction Company* and the auditor—the only thing that he had was an *order to deliver* those orders to us, although *our name did not appear* on the warrants, only on the order; \* \* \* " (p. 253).

*The claims were and the warrants were to be in the name of the construction company*, and no power was given the bank, or anyone else, to endorse the warrants in the name of the construction company. It was so arranged that the bank could not get the money from the city treasurer without the signature of the construction company. The so-called assignee could not avail himself of his security, in other words, without the consent of the assignor!

The power granted was only with reference to the *warrants*, not to their proceeds. *So it would be*

*exhausted when the agent (bank) should receive the warrants in its hands, and it could proceed no further without new authority from the principal.*

The power would have been fully exercised, *and therefore extinguished*, by receipt of the warrants.

The power to draw the warrants would be extinguished necessarily by exercise to the full extent of it, before the bank could arrive at the treasurer's office, *thus requiring intervention of the construction company in voluntary endorsement of the warrant or payment of the money to the agent.*

These are the undisputed facts in the record, and no amount of "intention" on the part of either the bank officials or the company officials can alter them or change them in any way, shape or manner.

Obviously, any attempt of the bank to endorse the warrants or collect the money would have been in excess of the power conferred and void.

Hawxhurst v. Rathgeb, 119 Cal. 531, 534.

Even if the power were coupled with an interest so as to be irrevocable, it became *functus officio* as having been completely exercised and, therefore, extinguished the moment the warrant could come into the possession of the bank, so that the bank would thereupon be in possession of a check payable to the construction company without any power whatever to collect the money on it.

In the case of Bank v. The City of Portland, the city issued its warrants to a contractor and paid the money to him in face of his previously made order,



delivered to the city recorder, similar in terms to the one in this case. The contractor's assignee sued the city on the theory that the order amounted to an assignment. But the Supreme Court of Oregon thought otherwise; Judge Bean, now one of the judges of the Ninth Circuit, writing the opinion, which is, in part, as follows:

“An order from a contractor addressed to the city recorder, to deliver to a company, from time to time, as certain work shall be accepted, warrants to be drawn by the city on a certain fund, equal in value to materials furnished by such company used in such work, does not contain words of transfer, or purport to assign an interest in an amount due or to become due from such city to such contractor, and is not directed to the debtor or custodian of the fund, and hence is not a valid equitable assignment of the contractor's claim.”

Com. Nat. Bank v. City of Portland, 60 Pac.

Rep. 563; 37 Ore. Rep. 33; Dec. by Bean, J.

And the principle governing such cases, to which all parties must conform and which has not been departed from in any case, was announced by Mr. Justice Swayne in his opinion for the Supreme Court of the United States in the case of *Christmas v. Russell*, as follows:

“An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment. The covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent *and its execution* are indispensable. The assignor *must not retain any control* over the

fund, *any authority to collect*, or *any power* of revocation. If he do, it is *fatal to the claim* of the assignee. The transfer must be of such a character that the FUND-HOLDER can *safely* pay, and is compellable to do so, though forbidden by the assignor."

Christmas v. Russell, 14 Wall. 69, 84, 20 Law. Ed. 762.

Please note that not only the intent is indispensable, but its *execution is indispensable*, and that *any* control or *any* power of revocation is fatal to the claim of the assignee.

"There must, however, be an appropriation of the debt or fund, and the assignor must confer the *complete* right or interest in the subject matter of the assignment on the assignee and *surrender all control* over it, even if the circumstances do not permit the assignee to take immediate possession thereof."

4 Cyc. 43.

The courts have regarded this matter of absolute and complete surrender of control as the turning point always in such cases. Counsel for the respondent has not cited one single case where the court has permitted an assignment to be inferred from the intention of the parties, where such complete and absolute surrender of control was lacking, nor have counsel for appellants, in their search for authorities, found such a case.

The paper given by the construction company did not authorize any change of the payee to be made in the demand, but, on the contrary, di-

rected that the demand should be drawn “in favor of the undersigned”, the construction company. This paper merely gave the bank authority to go to the office of the auditor if and when the warrants should be ready for delivery to the construction company and there to receive the paper just as it was made out, in the name of the construction company.

The power, therefore, was such as to be not only extinguished by its full execution before the holder of it could reach the fourth progress payment, but it was (a) not such as to enable the holder to execute it in his own name; (b) the interest, if any, was not in the subject matter of the power—the warrants—but only in the proceeds of a payment which could come into existence only by full exercise of the power; and (c) the power and the interest did not exist, therefore, with reference to the same thing.

31 Cyc., 1299.

The power, therefore, was *revocable* at the will of the construction company and that company could have demanded the warrants from the auditor at any time, because it does not require any writing or express words to revoke a power that is revocable. It follows that the auditor could have delivered the warrants at any time after December fifth to the construction company without incurring any liability, either personally or officially to the Portuguese-American Bank for so doing.



And the power was *actually revoked* by the appointment and qualification of receivers in the United States District Court on December 23, 1910 (p. 147), and who notified the auditor prior to the approval of the claims by the board of supervisors (p. 148).

Hunt v. Rousmanier, 8 Wheat. 174, 31 Cyc. p. 1299.

The court will contrast the case of

Norton v. Whitehead (84 Cal. 263)

with the case at bar. In the Norton case there was an assignment in writing. In this case there is none. In the Norton case there was a power of attorney giving the assignee authority to execute receipts and instruments. In this case there is none. In the Norton case the assignor gave the assignee a letter of introduction to the secretary of the board, but in the case at bar nothing of that kind was done. Nothing but a notice given in effect that the construction company had appointed the bank its agent to receive the paper warrants—a notice directed to an officer who had nothing to do with the performance of the contract or the payments under it, and having no warrants in his possession at the time, who had not and never would have any *money* with which to make the payment, in his possession, and finally a notice which was taken to the auditor's office and taken away again immediately.

As to the ruling in Christmas v. Russell and the Oregon case holding that not only a mere intent,

but "*its execution*" are indispensable, the referee (p. 171) simply takes issue with the Supreme Court of the United States on that point.

Concerning this, the idea of appellants is that if it can be said that all distinction between legal and equitable assignments is abolished in California, that this does not work any miraculous transformation and does not in one iota diminish the force of *Christmas v. Russell*. Such ruling would apply with equal force to an assignment, whether it be called a legal or an equitable assignment, and this is the view expressed by Judge BEAN in his opinion in the *Portland* case. He writes: "But the proof required of an assignment or transfer is the same at law as in equity." So that the brushing aside of legal refinements concerning equitable and legal assignments does not dispose of the question in any particular.

There is undisputed evidence tending strongly to show that the bank really placed reliance upon a mere promise of the construction company to pay out of the particular fund, whatever they may now say to the contrary, notwithstanding! We will briefly notice it:

Appellant Welles' notices to withhold were prior in fact and in point of time to any claim or notice of claim by the Portuguese bank, of an "assignment."

This bank now claims an "assignment." But it never gave notice of any such claim *as that* until after Mr. Welles had served his notices to withhold!

The notices of appellant Welles were served December 10, 12, 15 and 16, 1910 (pp. 149 and 150).

Not until December 17, 1910, did the bank give a notice of the claimed assignment (p. 143). This was after the bank learned (December 10, 1910, the day Welles filed his first notice) that the construction company was in financial difficulties (p. 142); and after the board of public works had recalled the demands from the office of the board of supervisors (p. 143).

The notice of December 5th, to the city auditor that the bank was empowered to draw the warrants, did not give notice of any claim of assignment, contained not a word on that subject!

Besides which, this notice (of December 5) was not given by the bank, but by the construction company, and the bank did not at any time prior to December 17, 1910, give notice of any claim of assignment of the fourth progress payment, so far as the record discloses.

Appellant Welles shows that *his* omission to obtain consent in writing from the board of public works was purely nominal and of no possible consequence by showing *actual knowledge* on the part of the board and its officers "*all the time openly and without any concealment*" (p. 137), but the bank does not attempt to show any actual notice of its claim of assignment to the city or to any proper officer.

A *reason* for this silence on the part of the bank is found in the fact that it could not take an *assign-*



*ment* without directly violating the terms of the construction company's contract with the city, requiring the consent of the board of public works to be first obtained (p. 137)!

And another reason is found in the fact that the bank officials had an idea the thing "would go right through" (p. 249), because they "hadn't had any trouble before that" (p. 249) on which occasion the money had been *received by L. F. Strong* (p. 251), *the construction company's secretary* (p. 232) *when the cashier of the bank was not present* (p. 251). The other gentleman with the cashier that day was the president of the construction company (p. 253), so that although the bank cashier went up in the company's auto (p. 254), *the city treasurer paid the money on that occasion to the construction company without the presence even of any representative of the bank!*

Subsequently, on examination by his own counsel, this witness appeared to say that he and not Strong, got the money (pp. 252, 253), but not really because he was not asked particularly whether he was present in the treasurer's office when the money was handed over and *the fact remains that Strong receipted the demands for THE CONSTRUCTION COMPANY!*

Beyond any question, therefore, the bank officials *relied for their money on their understanding* that the construction company officials *would endorse the warrants when the bank should get them from the auditor!*

The real reliance of the bank, therefore, *was upon this promise or understanding* with the construction company's officials. Every reason appears to exist why the bank should have relied upon such an unexpressed and revocable "understanding", because it "had no knowledge, information, or belief that the company was not a solvent corporation" and "believed the reputation of the company, financially, to be good at all times" (p. 142).

And as this, *at most*, amounted to no greater than a *revocable understanding*, a "promise to pay out of a particular fund", entirely unexpressed, it cannot be held an assignment, no matter how solemnly made, nor under what circumstances.

Christmas v. Russell, *supra*.

So far as the appellant Welles is concerned this record, therefore, discloses fully that he diligently and timely filed his notices, diligently appeared and presented his claim in the bankruptcy court, and actually gave notice to the city officials of his work under the contract, so that his omission to get a formal consent was of no consequence.

Contrasted with this is negligence on the part of the bank in *not* notifying any city official of its claim of "assignment" or getting the consent of the board of public works (a provision evidently intended for the protection of sub-contractors like Welles, whom that board *knew* to be doing the work as sub-contractor) and finally absolute failure of the bank in any manner to obtain complete control

of the fund they afterwards claim as secured to them if they were not relying upon a mere unexpressed understanding with the officers of the construction company that they would enable the bank to get the money out of the particular fund, by subsequently endorsing the warrants and paying the loan out of the proceeds. A mere promise!

Thus the essence of the transaction appears to be that the bank really relied, not on any assignment of a fund over which it had "complete control"; but on the promise of the construction company that it would pay out of a particular fund which the construction company, and not the bank, retained the right to collect, or to have a hand in collecting, which amounts to the same thing; the saying, "He who hath a partner, hath a master" being as true concerning this matter as any other.

It is respectfully submitted, therefore, that the bank had no assignment on December 10, 1910, nor December 15, 1910, when appellant Welles' notices to withhold became effective.



## POINT THREE.

## PRIORITY.

The appellants, thirdly, contend that Welles is entitled to priority in virtue of his notice to withhold, under Section 1184 of the Code of Civil Procedure of the State of California (applicable to this case). The provisions of Section 1184 as it existed at the time, are as follows:

“ \* \* \* any of the persons mentioned in Section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both.

“(Notice, how served.) Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement.

“No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters.

“(Withholding from contractor the amount.) Upon such notice being given, it shall be the

duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter."

This section has been held to apply to a sewer fund in possession of the city.

Goldtree v. San Diego, 8 Cal. App. 509.

On December 10 and 15, 1910, Welles fully complied with the provisions of this section by serving notices. The only question is whether the bank had a prior right at that time. Appellants contend that this statute was the law at the time the contract was made and is to be read into every contract between the city and its contractors, or between them and their sub-contractors, and that the bank is bound by it.

Appellants further contend that the fourth progress payment on the Fourth and Kentucky street sewer was not *matured*, and could not be *matured* until after it received the approval of the board of supervisors and the mayor. The board of public works might initiate the passage of the demand through the channels necessary to *mature* it, but the action of this board was only initiative; it took the

final action of all of the administrative or executive branches of the city government except the auditor and treasurer, before the payment could be said to be *matured*, so as to exclude a sub-contractor with a notice under Section 1184, Code of Civil Procedure!

This seems quite reasonable, and the reasoning is further borne out by the fact that the city charter requires (p. 22) that all these warrants *shall be advertised in a newspaper for a certain number of days* before they are finally passed by the board of supervisors. Unless the purpose is to give material men and laborers the opportunity to file their claims of lien within this time the publication of such intention to pass a resolution finally approving payment on a contract is of no effect whatever. The publication or advertising serves the purpose of giving such notice to material men and laborers, so that they might file liens. Therefore it is reasonable to conclude, under any ordinary use of human language, that the payments on a city contract cannot be said to have *matured* until at least they receive the approval of the board of supervisors.

The referee, in his opinion, states that the payments were *due* when they were passed by the board of public works. If this is true in any limited sense, nevertheless it is not true in the sense that is usually meant by the word "due". See "Words and



Phrases", "Due", Vol. 3; "As *matured*", p. 2216; "As *now payable*", p. 2217. In this sense of "*maturity*", the payments were neither "matured" nor "now payable", until they had received the approval of the board of supervisors, and could not *mature* until then, because it was not until such time that anyone could have made a demand upon the treasurer for the money.

The Supreme Court of the State of California has construed Section 1184 of the Code of Civil Procedure with reference to this very matter, and its construction, of course, is binding on this court. If we read the opinion in that case with this view of the *maturity of the payment* in mind, we can come to but one conclusion, namely, that the purport and intent of the Supreme Court in its opinion in that case was to lay down the rule that payments on contracts were subject to liens under notices to withhold up to the time when they were *matured*, so as to enable the one in whose favor they were to demand payment *from the fund-holder*, whether he was county treasurer or state comptroller. The Supreme Court in its opinion in the case in question was very careful, not only to use the word "*matured*", but to refer to it as the "time of matured payment", as the time when the installment on the contract price should be due and *payable immediately*.

For convenience, quotations from the opinion on this point are subjoined:

“The contractor cannot prevent the effect of this notice as to any payments that may *mature* after it is given, but its effect upon payments that have *matured* before it is given but which have not been made, is to be determined by the rights of the contractor with reference to them.” (125 Cal. Rep., p. 589, line 23.)

“If he is still *entitled to demand their payment from the owner*, such payment is intercepted,” etc. (p. 589, line 27.)

“The provision \* \* \* rendered such installments of the contract price *due and payable immediately*”, etc. (p. 589, paragraph and top line of p. 590.)

The Newport Co. v. Drew, 125 Cal. 585-589.

If this be the proper construction of the law with reference to these notices to withhold; if the payments in the case at bar, in any ordinary sense of the term, are said to be *matured* not until they have received the approval at least of the board of supervisors, then the notices to withhold given by Mr. Welles, December 10 and 15, 1910, operated to intercept them, and he has a prior right as against the Portuguese-American Bank to the fourth progress payment.

Certainly the construction company had no right to “demand payment” from the *city treasurer*, or from anyone else at the time these claims were approved by the board of public works—it had no

right at all to *immediate payment* at that time, because the claims had first to be advertised in the official paper and then to pass the board of supervisors and the mayor!

It is equally certain that the board of public works did not look upon its approval as final or in any measure entitling the construction company to demand immediate payment, because on December 12, 1910, it recalled this (and other) demands from the offices of the board of supervisors (p. 143) and retained them there until about December 26, 1910 (p. 145), so that at the time the bankruptcy proceedings were commenced, December 19, 1910, the claims were still in possession of the board of public works! Surely, up to this time, if the claims were really in a sense “due” the construction company there was nothing either “immediate” or “immediately payable” or “matured” about such dueeness—nothing that could reasonably be said to entitle the construction company to demand immediate payment at all.

Not only this, but by the very terms of the contract, the payments at this stage were liable to be *withheld* (p. 136).

If, therefore, there was a sum of money earned and remotely “due” on December 15, 1910, it was *then* not “payable”, nor “immediately payable”, not in any sense “matured”, not then in such a situation as to enable the contractor to make a demand



for payment or for a warrant, or to entitle him in any way to call upon the city treasurer for the funds, and, consequently (construing the Newport Wharf Co. case so as to carry out its intent and the intent of the city charter with reference to material men's claims) subject to be withheld under Section 1184, Code of Civil Procedure, of the State of California.

In other words the "payment" was not in a position so that the contractor could by assignment cut out any rights acquired by stop notice served prior to approval of the claims by the Board of Supervisors.

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To summarize, then, the court erred, in not holding that the opinion and order of December 12, 1911, adopting the report of the special referee and examiner, as the law of the case, were and are conclusive; in not holding that the alleged assignment was void because of failure to obtain consent; in holding that the Portuguese-American Bank should be regarded as the assignee of the fourth progress payment; and in holding said bank entitled to priority of payment in preference to appellant Welles. For each of which reasons the decree should be reversed, with directions that a decree be entered in favor of complainant for relief as prayed; or, if the court be of the opinion appel-

lant Welles is not entitled, then in favor of appellant John Daniel, as trustee, etc.

San Francisco, California,  
October 6, 1913.

Respectfully submitted,

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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES and JOHN DANIEL,  
Trustee of Metropolis Construction  
Company (a corporation), Bankrupt,  
*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO (a corporation),  
*Appellee.*

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## BRIEF FOR APPELLEE.

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### Statement of the Case.

On or about July 22, 1910, the Board of Public Works of the City and County of San Francisco entered into a written contract with Metropolis Construction Company (hereinafter designated as the Company) for the construction of certain sewer work in Kentucky and Fourth streets. That contract provides that the work will be done under the direction and to the satisfaction of said Board of Public Works (p. 26 Tr.) and also provides



for progress payments for labor and material incorporated in the work, to be based on monthly estimates by the City Engineer (p. 135 Tr.). It further provides that on each such estimate being made, the City and County of San Francisco will pay or cause to be paid, in the manner provided by law, an amount equal to 75 per cent of the estimate. It further provides, under "SUB-CONTRACT" heading, that the contractor shall not sublet the whole or any part of the work without permission of the Board of Public Works, and that to obtain such permission a copy of the contract for subletting must be filed; also, that the contractor shall not assign moneys payable under the contract without like consent of the Board (pp. 136-137 Tr.).

On or about July 30, 1910, this contract was sublet to Paul I. Welles by the company, without the formal consent above required (p. 137 Tr.). But Mr. Welles acted on the job with the knowledge of the Board.

The Charter provisions relating to contracts of this kind are contained in Chapter I of Article VI. Section 21 provides for progress payments. Section 22 provides that the work must be done under the direction and to the satisfaction of the Board of Public Works. Section 11 provides for the appointment of a City Engineer who shall certify to the progress and completion of the work.

Between the commencement of this work and December 5, 1910, three progress payments had been made (p. 138 Tr.), the demand for the third of which had been received by the cashier of the Portuguese-American Bank (hereinafter called the Bank) under a transaction similar to the one now in question, and the cash proceeds thereof taken away by him from the city Treasury (pp. 144-145 Tr.).

On December 3, 1910, the City Engineer made his fourth estimate (p. 217 Tr.) of progressive work under the contract, which was approved by the Board of Public Works on December 5, 1910. On the same day the Board of Public Works by resolution authorized a fourth progress payment of \$6830.85 to be made to the company (p. 256 Tr.) and on the same day a demand for that sum was presented by the Metropolis Construction Company and approved by the Board of Public Works, and was forwarded to the Supervisors of the City (pp. 138-213 Tr.). *Said resolution has never been revoked.*

On December 5, 1910, Chris Emille, within the scope of his authority as general manager of the company, accompanied by L. F. Strong, assistant secretary, went to the Bank for the purpose of obtaining a loan of \$30,000. The Bank required collateral security for the loan, and the company offered to assign to the Bank as such security three certain demands on the Treasury of the City and

County of San Francisco (including the one in suit), and the moneys represented thereby, and produced an order on the Auditor of said City and County authorizing and empowering the Bank to draw the warrants in favor of the company for the amount of money therein set forth,—specifying the amount of the fourth progress payment \$6830.85, and two others (p. 139 Tr.). With this order the company offered a certified copy of a resolution of the Board of Public Works which allowed the company the sum of \$6830.85 as fourth progress payment under the contract. The Bank required that the order be presented at the Auditor's office and accepted by the Auditor, before it would loan any money thereon. The company complied with that requirement, and, leaving a copy with the Auditor, had the original stamped, "Received Auditor's Office Dec. 6, 1910, Ans. H. J." The order was again presented at the Bank on December 6, 1910, and the Bank loaned the money, taking the order as security for the company's note, the company understanding the order to be a "complete assignment of the full amount of the three warrants set forth therein" (p. 141 Tr.). Thereafter, and on December 7, 1910, at the request of the company, the Bank loaned it five thousand (\$5000.00) dollars additional, to pay labor, on the same security. The warrant mentioned in the order, for the fourth progress payment, is the demand sued for in this action. All the money loaned was drawn out on the



company's checks, with the exception of one and 6/100 (\$1.06) dollars, and has not been repaid.

Neither the president of the Bank, who made the loan, nor the cashier, had any knowledge, information or belief that the company was not solvent at the times the loans were made, and did not know and had no cause to suspect bankruptcy (p. 142 Tr.).

The record shows that at the times the loans were made no notice by appellant Welles was on file requiring the City to hold back money to pay him on his subcontract, and that his subcontract was not on file with the Board of Public Works.

After the making of these loans by the Bank on December 6 and 7, 1910, appellant Paul I. Welles on December 12 and 16, 1910, served notices on the City to withhold money due or to become due to the company, under Section 1184 of the Code of Civil Procedure of this State.

Thereafter, on December 19, 1910, a petition in *involuntary* bankruptcy was filed against the company, and in due course it was, on January 5, 1911, adjudged a bankrupt. On February 1, 1911, John Daniel was appointed trustee.

That on January 26, 1911, the Bank filed suit in the Superior Court of the City and County of San Francisco, State of California, against Thomas F. Boyle, Auditor of the said City and County, wherein it claimed title to said demands and

prayed that said Auditor should be required to deliver to it the possession thereof.

While said suit was pending, and on April 18, 1911, appellant Welles filed the present suit in equity in the District Court, against the Bank, the trustee in bankruptcy of the company, and Auditor Boyle.

Upon the filing of this suit in equity, an order was made requiring the defendants to show cause why the Auditor should not approve the demand and deliver it to the trustee to abide the result of the action and why the Bank should not be enjoined from prosecuting the suit in the State Court (p. 45 Tr.).

On June 27, 1911, the Bank filed its amended return to this order to show cause (p. 54 Tr.).

On July 3, 1911, the Auditor filed his amended return and answer to the order to show cause (p. 64 Tr.), and on July 10, 1911, Paul I. Welles filed his replication thereto.

Thereafter, on July 11, 1911, the case was referred to the Referee to hear the testimony and find the facts on the issues made by the pleadings; and the Bank was in the meantime restrained from prosecuting the mandamus suit in the State Court (p. 78 Tr.).

Thereafter hearings were had upon said reference before the Referee which were concluded on September 5th, 1911, when the matter was submitted to him (p. 92 Tr.).

The report of the Referee finding the facts was filed October 14, 1911; and, no objections having been taken thereto, it was ordered confirmed on December 12, 1911.

In a "memorandum opinion" filed on that day the judge concluded that complainant was entitled to the relief demanded in the bill of complaint; and that this was not a bankruptcy proceeding, but an independent suit in equity (p. 113 Tr.). On this opinion a "minute order" was entered by the clerk December 12, 1911.

But as this was a report upon an order to show cause, wherein the issues were not joined by answer of either the Bank or the trustee, no decree was ever taken on the "memorandum opinion".

On December 13, 1911, a formal order was made and entered disposing of the issues on the order to show cause, and on this order a writ of injunction and mandamus was issued (p. 116 Tr.).

After the reference on the order to show cause, and on September 5, 1911, the trustee filed his answer to the bill of complaint.

Thereafter and on October 6, 1911, the Bank filed its answer to the bill of complaint (p. 81 Tr.).

On October 16, 1911, complainant filed his replication to the answer of the Bank; and on October 19, 1911, he filed his replication to the answer of the trustee (pp. 113-112 Tr.).

Thereafter, on December 26, 1911, the case was on motion of C. A. S. Frost, Esq., referred to the



Referee on final hearing to hear the testimony and proofs and find the facts on the issues arising on the pleadings, and to report his findings and conclusions to the court (pp. 119-120 Tr.).

Thereafter on March 8, 1912, the Referee filed his report under the last order, and seemed to think his former findings, as confirmed, were *res adjudicata* on this hearing, because of the opinion expressed by the Judge in the memorandum of December 12, 1911 (p. 120 Tr.), and asked instructions as to further proceedings, if any.

To this report and finding the Bank filed exceptions April 6, 1912 (p. 125 Tr.).

These exceptions, and a motion by complainant to amend the prayer of his bill, were heard on April 15, 1912. The exceptions were sustained and the motion to amend granted. The cause was again referred to the Special Referee and Examiner to ascertain and report the facts and his conclusions of law therefrom, on the testimony taken and on file without reference to the findings and report upon which the preliminary injunction was based (p. 128 Tr.).

Thereafter, on July 16, 1912, the Special Referee and Examiner filed his findings of fact and conclusions of law on final hearing, finding that the fourth progress payment was assigned to the Bank and that the assignment and right of the Bank to receive the proceeds thereof were not affected by

the notices to withhold made by Welles (pp. 132 to 172 Tr.).

On August 14 and 16, 1912, Welles and the trustee respectively filed their exceptions to this report (pp. 172, 180 Tr.).

Thereafter and on January 18, 1913, the Court made and entered its order confirming this report, and directing a decree for appellee (p. 185 Tr.).

Thereafter and on January 30, 1913, the decree in favor of the appellee was signed by the Judge (p. 186 Tr.).

The learned Judge of the Court below, in the portion of the opinion (p. 184 Tr.) criticised by appellants, merely states, that what on first blush appeared to be strong equities in the appellant Welles, faded away upon a consideration of the facts. This was not necessary to the decision, and the opinion would have been complete without it. It is not the basis of the opinion, but merely an independent balancing of equities,—the Court pointing out how Welles could have amply protected himself, under the law, against assignments and all other contingencies.

We otherwise agree with appellants that if Mr. Welles' notices to withhold were within time under Section 1184, Code of Civil Procedure of California, no laches are imputable to Welles. But on the other hand, if they were not within time, laches are likewise immaterial. But, as the appellant Welles had strenuously contended that he had strong

equities, it was only natural that the learned Judge who wrote the opinion should have adverted to the point, although it could not weigh with the Court if the Bank's assignment was made after the fourth progress payment fell due.

We will now consider the contentions made by appellants, taking up the consideration of each point in the order discussed in their brief.

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#### REPLY TO APPELLANTS' FOURTH POINT.

Appellants' contention, numbered four on page 18 of their brief, and discussed first, is that the "memorandum opinion" and "minute order" of December 12, 1911 (pp. 113, 114 Tr.), "is conclusive as the law of the case, and fixes the right of complainant Welles to have a decree entered in his favor in the absence of new or changed facts or findings of fact in the Referee's final report."

Before proceeding to show that appellants' point number four is untenable, we desire to advert to several statements found in their discussion thereof which we claim find no support in the record.

In the first place, on December 18, 1911, the cause was not *ordered back* to the Referee for final hearing, but was on December 26, 1911, *ordered referred* to the Referee on final hearing, *to hear the testimony and proofs* of the parties, *to find the facts* upon the issues arising upon the pleadings, and to *report* his findings and con-



clusions to the Court (p. 119 Tr.). This is an independent order of reference, and we wish to emphasize this fact, because much of appellants' argument is founded on loose language.

In the second place, the Bank excepted to the second report of the Referee on the ground, among others, that the Referee erred in treating the confirmation of his report on the hearing of the order to show cause as *res adjudicata as to the facts and relief* (p. 126 Tr.) and not, as appellants would represent, as to the *facts alone*.

In the third place, on April 15, 1912, the Court did not return the matter to the Referee on final hearing, to give *the bank an opportunity* to produce further proof, or expressly or otherwise giving any party a *chance* to introduce further proof. A glance at the order (p. 128 Tr.) will show how misleading this statement is. The Special Referee and Examiner is required to ascertain and report the facts and his conclusions of law therefrom,

*“on the testimony taken and on file herein, on the issues joined, without any reference to the findings and report on which the preliminary injunction was based.”* (Italics are ours.)

“On the *testimony taken and on file herein*”: does that permit of “a chance to introduce further proof”? On the contrary, the *merits* were *open* for findings and conclusions upon the testimony *then in*, *without reference* to any former findings or report.

Our object in mentioning the foregoing matters is to dispel any idea that the second or third order

referring the case to the Referee, was for the purpose of giving the Bank *a chance* to introduce further proof. If for any purpose at all, it was for the purpose of throwing the whole case open for a consideration on its merits (4th exception p. 126 Tr.). The Court absolutely repudiated any inference that it had *decided the merits*.

It is rather difficult to grasp the exact point made by appellants, in their fourth specification. In the last paragraph on page 22 of their brief, they state that the *report*, as confirmed on December 12, 1911, is *the law of the case*: in the second paragraph on page 23, they say that the *ruling* became *the law of the case*; and then, on the latter page, they quote from a decision by Judge Van Fleet, which holds that the *principles announced* in an opinion became *the law of the case*.

What, then, is the *law of the case*? The *report* of the Referee? The “*memorandum opinion*” of December 12? Or, the *principles announced* in the “*memorandum opinion*” of December 12?

The record upon which the “*memorandum opinion*” was based did not include the answers of the Trustee or the Bank (p. 93 Tr.). The object of the suit was the trial of a question of title, and the relief asked, and awarded at that preliminary stage of the suit, was injunctive, to preserve the *status quo* and to insure the power of the Court to enforce its ultimate decree (p. 115 Tr.).

Now, the case up to and including December 12, 1911, was still open for the proper decree. On the next day, *December 13*, the first “solemn ruling” was made. Here is a formal order (p. 115 Tr.) granting complainant *specific relief*, drawn and presented by *counsel for complainant*, signed by “*John J. De Haven, District Judge*,” and filed December 13, 1911. Then, on the 15th day of December, 1911, a *writ of injunction and mandamus* (p. 116 Tr.) was issued.

No decree having been given or entered upon the “memorandum opinion” and “minute order” other than the order of December 13th, which was *signed by the judge*, it must be conclusively presumed that this order, which was the last deliberate direction to the clerk, was the ruling and only ruling, at that stage of the case. This finds ample support in the following authorities:

Estate of Cook, 77 Cal. 227, 11 Am. St. Rep. 267;

Byrne v. Hoag, 116 Cal. 1;

O’Brien v. O’Brien, 124 Cal. 422;

Belger v. Sanchez, 137 Cal. p. 618.

*Law of the case* applies only to decisions of appellate Courts, and it is not only within the power, but it is the duty, of a *nisi prius* Court to change its ruling of law during the progress of a case when such ruling was erroneous, and was not followed up by an appealable order.

Lawrence v. Ballou, 37 Cal. p. 521.



But, since the “memorandum opinion” cannot be looked on as stating *the law of the case*, can it be regarded as *res adjudicata* of what was never adjudged?

If the memorandum opinion was ever intended to have the effect contended for by the appellants (which we deny), then the Court was at liberty to change that opinion at any time before a decree was entered.

In other words, the lower Court is absolutely foot-loose, at all stages of a case pending therein, to change its opinions, until it has deprived itself of the power to do so by the giving and entering of an appealable order or decree, and that order or decree, and not the opinion once held by the Court, is the ruling on the matters therein adjudged.

“It is a most common occurrence for a trial Court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that its former ruling was erroneous.”

De La Beckwith v. Superior Court, 146 Cal. p. 499.

As no *final decree* was ever made or entered on the “memorandum opinion” and “minute order” of December 12, 1911 (which were merely *directions for a decree*), and as the Court changed its opinion and substituted in its place *that of January 18, 1913* (p. 183 Tr.), which was duly followed by *minute order* (p. 185 Tr.), ordering a decree for the Bank

in accordance therewith, which was duly followed by a *final decree*, the first and only one in the cause (p. 186 Tr.), the doctrine of *res adjudicata* has no application.

See Freeman on Judgments (4th Ed.), Sec. 251.

These observations eliminate *Loewe v. Federation of Labor*, 189 Fed. 714, as an authority in point. There, an order for injunction was made and a writ of injunction issued on the preliminary hearing; here, no order was made prior to final decree except that of December 13, 1911. There, the ultimate relief was injunction; here, was involved a question of title, and the preliminary relief was only *collateral* to the issue. There, the opinion of Judge Morrow (139 Fed. 71) announced "*principles*" which Judge Van Fleet found were *supported* by the *facts* on final hearing; here, the "memorandum opinion" announces *no principles*.

Again, injunction suits are peculiar in that the ultimate relief is of the same quality as the interlocutory relief. Hence, if an interlocutory injunction has been granted after a hearing, and the facts on final hearing support the interlocutory order, there would be *strong reason* for perpetuating the injunction. But we submit that the rule of reason goes no further than that.

The application of that rule would have justified the decision in the *Loewe* case. But to hold that the "*principles announced*" in an opinion in a

Court of *nisi prius* become "the law of the case," as an absolute rule binding the action of that Court on final hearing, even though error should appear, is not, we submit, supported by authority.

Rodgers v. Pitt et al., 129 Fed. 932;

High on Injunctions (4th Ed.), Sec. 5;

Andrae v. Redfield, 12 Blatchf. p. 425.

Finally, the memorandum opinion of December 12, 1911, merely states that \* \* \* "it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint."

Now, *at the time of this opinion*, what was the relief demanded in the bill of complaint?

It was merely (in substance):

That the auditor be required to surrender the demand on the City Treasury to the Trustee;

That the Trustee be required to account with complainant;

That the Portuguese-American Bank be required by due process of this Court *to make answer* to the bill and *to assert in this Court* its claim to said warrant and *to abide the judgment* of this Court;

That the bank be enjoined from *further proceeding* with its *mandamus suit* in the State Court (p. 24 Tr.);

Subsequently, on *April 16, 1912*, complainant, by leave of Court, filed an *amended prayer* to his bill of complaint demanding *further and more specific relief* (p. 128 Tr.).



As the answer of the Bank was not before the Referee, its time to plead not having expired, any opinion of the Court upon the merits of the action would have been premature, and it is not to be presumed that the expression of opinion in the memorandum meant anything more than that complainant was entitled to the relief asked for in the order to show cause.

Such was the construction placed upon the "memorandum opinion" by all parties (see appellants' brief on this point, pp. 7 and 8), for the actual decree that was entered, aside from confirming the report, granted an injunction *pendente lite* against the Bank and ordered Auditor Boyle

\* \* \* "to deliver the same (the demand) to defendant John Daniel as Trustee herein, to abide the result of this action the proceeds to be distributed to whomsoever *shall be lawfully entitled.*" (Italics are ours.)

If this was not the decree to which Mr. Welles was entitled under the "memorandum opinion," then why did he take that order?

In conclusion, we submit that this highly technical contention of appellants, so persistently urged before Judge De Haven, himself, and by him overruled (p. 128 Tr.); and before Judge Dietrich, and by him overruled (p. 183 Tr.), is not only unsupported by reason or authority, but is utterly untenable on the record.

## REPLY TO APPELLANTS' POINT ONE.

Appellants now contend that the assignment from the Metropolis Construction Company to the Bank is absolutely null and void because of a provision in the contract that the moneys payable thereunder shall not be assigned without the consent of the Board of Public Works.

*This point was not made when the matter was submitted to Judge Dietrich.*

This point was briefed by the Bank while the matter was before the Referee and the appellants abandoned it then. In brief filed with the Referee, dated February 15, 1912, on page 16, appellants state:

“It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank has wasted its discussion of that point, on pages 4, 5 and 6 of the brief.”

The Referee found (p. 152 Tr.):

“The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city.”

*No exception to this finding of the Referee was taken.*

This finding was adopted by the Court (p. 183 Tr.) and *no assignment of error is based thereon.*

We believe this point cannot be considered now on appeal, but as it is presented we will again show there is no merit in it.

The provision in the contract between the city and the company relating to the assignment of payments is in only that portion of the specifications annexed to the contract entitled "Subcontract".

These provisions are set out on pages 136 and 137 of the Transcript.

These provisions commence with "Subcontract," and, ordinarily, the matters therein would be held to refer to "Subcontract". To sublet or to assign the contract consent is required.

The extract from these provisions set out on page 25 of appellants' brief will mislead unless the full paragraph is considered.

It is:

*"No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works."* (Italics are ours.)

The obvious meaning of this paragraph is that if the contractor sublets, he shall not assign the



payments to the subcontractor, without consent. It does not mean that when the money is due the contractor, he cannot go to a bank and get a loan upon the security thereof.

“Nor does it (provision against assignment) prevent assignment as collateral security.”

Page on Contracts, Vol. 3, p. 1943, Sec. 1263.

Again the words, “moneys payable” and “claim thereto” may very well refer to future earnings. The policy of the law does not in a case of this kind prohibit the assignment of money already earned and ordered paid.

“A provision against assignment without consent of the adversary party does not prevent a party who has performed from assigning his right to compensation.”

Page on Contracts, Vol. 3, p. 1943, Sec. 1263.

The company had already earned this payment (pp. 96, 138, Tr.).

The specifications in that respect should receive a reasonable and liberal construction, so as to carry out the spirit of the progress payment provisions of the Charter and the contract, viz.; “to assist the contractor to *prosecute the work advantageously*” (p. 135 Tr.).

But assuming that in *this case* the consent of the Board of Works should have been obtained, what then? The contract does *not* provide that the assignment shall be *void*. They may not be as-

signed without consent. If they are, who can complain? Only the City.

Such a provision is for the benefit of the City alone, and *no one else* can complain of its breach; and such assignment is *not rendered void*.

“An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision in the contract against assignment, such provision that neither the contract nor any of the moneys payable under it shall be assigned without the consent of the City in writing, is but for the protection of the City and can be availed of only by the City. A junior assignee of the moneys cannot avail himself of the provisions to obtain a more favorable position in the order of payment.”

Fortunato v. Patten, 147 N. Y. 277;

Jones, Pledges and Coll. Securities (3rd Ed.), p. 143, Sec. 136a.

“It was strenuously urged on the argument by the counsel for the bank that the disposition of this case by the Court below is justified by *Burck v. Taylor*, 152 U. S. 634. It is sufficient to point out that the case cited dealt with a contract made by an individual with the State of Texas, which contained an absolute, unqualified covenant that it should not be assigned in whole or in part without the written consent of the State.

“In the case at bar the substance of the covenant is that if the contract or any part of the moneys due under it are assigned without consent no claim can be asserted by virtue thereof against the City.

“In the case at bar no absolute assignment has been made of the contract, but all transfers

were of moneys due thereunder as collateral to secure the payment of a debt.

*“There is a wide difference between assigning moneys due under a contract and an absolute assignment of the contract itself as the latter act disturbs that relation of personal confidence which exists between one desiring work done that requires a high order of skill and intelligence and the contractor he may have selected as possessing these necessary qualifications (Delaware County v. Diebold Safe & Lock Co., 133 U. S. 479).”*

“For that reason, we think the case of *Burck v. Taylor* has no application to the case before us.” (Italics are ours.)

*Fortunato v. Patten*, 147 N. Y. 277.

Where contract provisions or the policy of the law prohibit assignments, it has been repeatedly held that an assignment for security is not within the prohibition.

*Jones, Pledges and Coll. Securities*, 3rd Edition, p. 143, Sec. 136a; also on p. 181;

*Page on Contracts*, Vol. 3, p. 1943, Sec. 1263;

*Fortunato v. Patten*, 147 N. Y. 277;

*Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, at page 252;

*Butler v. Rockwell*, 14 Colo. 125;

*Crouse v. Mitchell*, 130 Mich. 347, 97 Am. St. Rep. 479;

See note to *Mueller v. Northwestern University*, 88 Am. St. Rep. at page 206.

*Butler v. San Francisco Gas & Electric Co.*, cited by appellants, is a decision of the District Court of



Appeal of California and is not an authority as a rehearing therein was granted by the Supreme Court of California on July 28, 1913, and the matter is now pending. Five judges of the Supreme Court signed the order granting a rehearing.

Burck v. Taylor has been shown in extracts from Fortunato v. Patten, 147 N. Y. 277, set out above, to have no application to a case like the one at bar.

The cases cited by appellants establish what we do not dispute: that a clause in a contract prohibiting the assignment of the *contract itself*—may be enforced.

Appellants' argument goes to show such provisions in contracts against assignability, at most, can be invoked only by the City.

If the provisions in the City's contract render an assignment or subcontract void without the consent of the City, then Welles subcontract is void as he did not obtain such consent (the procedure for obtaining which is explicitly set forth in the contract). Appellants argue that the City is "estopped" from raising this objection. If it is "estopped" it is because such provisions can be invoked by the City only.

The Trustee in bankruptcy has no greater rights than an "*execution creditor*" and the rights of an *execution creditor* are subordinate to those of an assignee whose rights accrued prior in time.

The Bank's rights date from December 6th, 1910, while the Trustee's date from December 19th, 1910, the date of the filing of the petition in bankruptcy.

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**REPLY TO APPELLANTS' POINT TWO.**

The point is, that the finding that the parties intended an assignment is not legally justified by the evidence; that the evidence is insufficient to support that finding; and, that the Court cannot say the facts amount to an assignment, as a matter of law.

Before proceeding with this point, we desire to call attention to some inaccurate statements contained in appellants' discussion thereof.

Appellants state, page 31 of brief, "The notice, even, was not left there, but was brought back to the Bank (p. 141 Tr.)". This idea is repeated several times.

The findings of the Referee (p. 141 Tr.) show that Mr. Strong on December 6th, 1910, "left a copy of said order (the notice mentioned by appellants) with the Auditor". This is supported by the evidence (p. 230 Tr.).

Appellants' statement, pages 36, 37, of brief, that the paper given by the construction company, "directed that the demand should be drawn 'in favor of the undersigned', the construction company," is incorrect. By the omission of the last

portion of the sentence, appellants change, or attempt to change, its meaning.

The paper notifies the Auditor that the Bank “is hereby authorized and empowered to draw the warrants in favor of the undersigned *against city and county* (p. 139 Tr.). (Italics ours.)

Appellants’ statements, page 41 of brief, that on the occasion of the collection of moneys on a prior assignment “*the money had been received by L. F. Strong* (p. 251), *the construction company’s secretary* (p. 232), *when the cashier of the Bank was not present*” (p. 251), and, “*the City Treasurer paid the money on that occasion to the construction company without the presence even of any representative of the Bank,*” are wholly unsupported.

There is absolutely no evidence that Mr. Strong collected this money or that the Bank’s representative was not present when it was paid. On the contrary the testimony shows the cashier of the Bank received the money from the Treasurer.

Appellants’ reference to p. 251 of the transcript does not show that L. F. Strong collected the money. It shows that witness Lewis testified “I was not in the Treasurer’s office when these demands were paid; I don’t know who received the money on these warrants.”

Mr. Figueiredo, the Bank’s cashier testified (p. 252, 253 Tr.), “Then I took the warrants to the



Treasurer and got the money". "I received the money and not Mr. Strong".

This is the only testimony or evidence touching the collection of the money on the prior assignment, and the above statements of appellants are absolutely unwarranted.

Appellants' argument seems to be, that to support the Bank's assignment it will be necessary to hold that "surrender of control" is not a necessary element of a valid assignment. They intimate that the Referee did not consider it necessary, and that he takes issue with the Supreme Court of the United States on this point.

We agree, and never disputed, that "surrender of control", as *understood by the Courts*, is necessary to a valid assignment.

We believe the principles announced by the Supreme Court of the United States in the decision in *Christmas v. Russell* to be sound and we do not expect this Court to override them. The Referee was not willing to override them, but he would do so *if* they were in conflict with the decisions of the Supreme Court of California. The Referee's opinion that the property rights of these parties (all citizens of the State of California), should be determined according to the statutes and decisions

of the Supreme Court of the State of California is correct.

Butcher v. Cheshire R. R. Co., 125 U. S.  
at page 583;

Rose's Code of Federal Procedure, Vol. I,  
under Sec. 10, notes (a), (aa) and (b).

However there is no inconsistency between Christmas v. Russell and McIntyre v. Hauser, 131 Cal. 11, the cases mentioned by the Referee.

The Referee compared the case at bar with Christmas v. Russell and stated (p. 170 Tr.):

“Considering the matter from the standpoint of an equitable assignment, I am also of the opinion that the facts of the case constitute an equitable assignment within the rule of Christmas v. Russell, above referred to.”

In the case at bar there was not only an intention to assign but there was also an execution of the intention.

The question in the mind of the Referee at the time he compared Christmas v. Russell and McIntyre v. Hauser (p. 171 Tr.) and which has aroused appellants' criticism, was: What was the intention of the company and the Bank in relation to the transactions which are claimed constituted an assignment? If the intention was to assign then there was an assignment. He found that there was such an intention, and he stated that under the rule laid down in McIntyre v. Hauser, the passage of title took place.

The rule laid down in *McIntyre v. Hauser*, 131 Cal. 11, is:

“In order to constitute an equitable assignment of a debt, no express words to that effect are necessary, if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment would have been held to have taken place.”

This certainly does not hold that a *mere intent*, without its execution is sufficient.

It is hard to understand what appellants mean by “surrender of control”.

They seem to think that there was no surrender of control because no notice was given to the Board of Public Works and other city officials; because the order was not accepted by the Auditor; because there was no statement in the order of a loan, or of a consideration or of an assignment; because no power of attorney was given to the Bank.

None of these things were necessary. When the whole transaction shows that it was the intention of the parties that *title* to the money due was *transferred* by the company to the Bank, and that the company was no longer in a position to *rightfully demand* the payment of that money to it, then there was a surrender of control.

Surrender of control relates to the *intention* to divest oneself of one's rights.



It relates to the *intention* accompanying a transfer and not to the *means* of carrying a transfer into effect.

It takes place if the rights conferred upon the assignee are not revocable. When the *locus poenitentiae* does not remain in the assignor, control has been surrendered.

“No particular mode or form is necessary to effect a valid assignment. The assignment *need not be in writing*, and if in writing it may be in the form of an agreement or *order*, or in the form of any *other instrument* which the *parties themselves* may use for the purpose.” (Italics ours.)

4 Cyc., 37.

“An assignment may be inferred from the conduct of the parties.”

4 Cyc., p. 43.

No notice of an assignment need be given.

Vol. II, Am. & Eng. Enc. Law, 1076.

To negative the proposition that an intention to assign existed, appellants lay stress upon a former transaction between the same parties relating to a similar loan, when an order in the same language was used.

They say that although such an order was given to the Bank, still the money was paid by the Treasurer, not to the Bank, but to the secretary of the company, and that it was paid without the presence even of any representative of the Bank.

We have just shown these statements are wholly unsupported.

Appellants state, page 33 of brief, "On the contrary, also, the testimony of the cashier of the bank who made the loan shows that he fully understood that this was the only effect the notice had:" i. e., that the Bank was the agent of the construction company to receive the warrants.

In the first place, the cashier did not make the loan, it was made by the president of the Bank (p. 139 Tr.); and, in the second place, appellants, from the portion of the testimony quoted, omit a material part.

An examination of the cashier's testimony on page 253 of the transcript, and especially the cross-examination (conducted by appellants), shows that the cashier was not testifying about his understanding of the *legal effect* of the order on the Auditor, but was *explaining why he had suggested that Mr. Strong should endorse the warrants.*

We give a fuller extract:

*"Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion. The warrants were made out in the name of the Metropolis Construction Co.; and the Auditor, the only thing that he had was an order to deliver those orders to us, although our name didn't appear on the warrants, only on the order; therefore Mr. Strong signed them"* (p. 253 Tr.), (see Findings, p. 160 Tr.). (Italics ours.)

The statement of the cashier that “the only thing that he (the Auditor) had was an *order to deliver* those orders to us” means the Auditor had no *papers* other than the order. It cannot mean, as appellants would have you believe, that the cashier was discussing the legal effect of the writing, and that he expressed his understanding that the order made the Bank the company’s agent to receive the warrants and nothing more. On the contrary the cashier states that “The paper gave me authority to receive the money” (p. 253 Tr.).

If the Cashier had such an understanding, why would he and the President of the Bank require that the order be accepted by the Auditor before regarding it as collateral? The Referee finds that this was required when the order was first presented (pp. 99, 140 Tr.).

The mere fact that the secretary of the company receipted for the demands is immaterial.

This was done at the request of the Bank’s cashier (p. 253 Tr.), (Findings, p. 160 Tr.).

It does not follow that because the company’s agent receipted for the demands, his receipt was necessary in order to get the money from the treasury.

The Referee finds (p. 144 Tr.), that all demands of this kind

“are received by the Auditor and by him *delivered to the person shown to be entitled thereto*; who takes the same to the City Treasurer,



there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words 'Received Payment' printed upon the demand." (*Italics ours.*)

This finding is supported by the testimony of Lewis on page 250 of the transcript.

There is no evidence whatever, nor can there be an inference, that the company was required to endorse its name on the demand. As a matter of fact there is no evidence that its name was endorsed on the demand for the third payment. The evidence merely shows that the name "L. F. STRONG" was endorsed upon it.

The evidence discloses that the demand was delivered to the cashier of the Bank (Finding, p. 144 Tr., Testimony, p. 252 Tr.).

The cashier testified that the Auditor required that he be identified before he could get the warrants and that he had some one from the Treasurer's office to identify him, and that the president and secretary of the company were with him at the time (p. 252 Tr.).

If, as appellants say, the company could have demanded the warrants from the Auditor, why did not its officers get them without the identification of the cashier? Apparently the Auditor would not even accept the cashier's identification by them.

We may safely conclude that the Auditor determines who is entitled to the demand, and that the

Treasurer will pay it to whomsoever presents it and that he merely requires the receipt of the latter.

If a demand, after auditing, bears any resemblance to a bank check, it resembles a check *payable to bearer*.

Appellants state that the Bank was merely the agent to receive the warrants and that its power would be extinguished on receipt thereof: that it could not get the money from the City Treasurer without the signature of the construction company: that the words of the order on the Auditor limited its power to receive the warrants from the Auditor.

We insist that the words the Bank “is authorized and empowered to *draw* the warrants” mean that the Bank is authorized to *receive payment* of the money, and that the Referee’s opinion to this effect (p. 171 Tr.) is correct.

We have just shown that it does not appear that the Treasurer would require the receipt of any person except the one receiving the money, and that the Bank could collect from the Treasurer by merely presenting the demand and giving its receipt.

If the Treasurer required further evidence of the Bank’s authority before honoring the demand, the Bank could leave with him its copy of the order on the Auditor.

If the Treasurer still refused to honor the demand the Bank could compel endorsement by the com-

pany, or it could sue the Treasurer and get a judgment against him.

*Scheerer v. Edgar*, 76 Cal. 569.

The Referee's conclusion (p. 162 Tr.) "that it was not the intention of the company to reserve any right for its own use and benefit, or at all, either to revoke the order on the Auditor or to collect the money", is not only fully supported by the transaction of December 6, 1910, but also by the statement of Mr. Emille made to the Bank's cashier at the time of the loan, that the order on the Auditor "was a complete assignment of the full amount of the three warrants" (Testimony of V. L. DeFigueiredo, p. 243 Tr.).

Again, Emille himself testified: "at the time I turned it (the order on the Auditor) over to the Bank, my understanding as to its nature was that it was an assignment for them to draw the money from the City Treasury" (p. 229 Tr.).

In the words of appellants (pp. 77, 78 Tr.) this was not "conflicting or contentious testimony", and is, therefore, entitled to great weight.

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

Section 1649, Civil Code of California.

Appellants' support of their statement that "There is undisputed evidence tending strongly to show that the Bank really placed reliance upon



the mere promise of the construction company to pay out of a particular fund," is that the Bank gave no *notice* of its assignment until December 17, 1910.

They refer to no *undisputed* or any evidence.

Furthermore, there is none.

It is entirely immaterial when the Bank gave notice of the assignment, for no notice need be given of an assignment.

Appellants' statement (p. 33 Brief), "It was so arranged that the bank could not get the money from the City Treasurer without the signature of the construction company," is wholly unsupported.

On the contrary the Referee finds that:

"The record does not show that the right to endorse this warrant was reserved by this company for any purpose whatsoever" (p. 170 Tr.).

Appellants' statement "The power granted was only with reference to the *warrants*, not to their proceeds. So *it would be exhausted when the agent* (Bank) *should receive the warrants in its hands*, and it could proceed no further without new authority from the principal," is misleading.

In considering the order on the Auditor, the Referee correctly finds that:

"The words the bank is 'authorized and empowered to *draw* the warrants in favor of the Company' have a further significance than merely to receive the paper warrant, and in my

opinion embraces the payment of the money to the Bank'' (p. 171 Tr.). (*Italics ours.*)

Appellants state, page 40 brief, that the demands had been *recalled* by the Board of Public Works from the office of the Board of Supervisors. Page 143 of the transcript discloses that the *President* of the Board of Public Works merely requested the Supervisors to withhold from *final passage* the demands of the Metropolis Construction Company, and that the demands were returned to the Board of Public Works where they remained for about two weeks.

There is no evidence that the demands were recalled. The Referee found (pp. 99, 140) that the resolution of the Board of Public Works for the payment of the fourth progress payment has not been revoked.

Appellants state, page 31 brief, "The warrants were not in existence at the time the notice in question was taken to the Auditor's office."

"Demands upon the Treasury" and "warrants" mean the same thing. An examination of the demand sued for in this action, on pages 213, 214, 215, 216 of the transcript shows that the demand on the treasury, or warrant, is merely a verified bill of the Metropolis Construction Company attached to a printed form containing numerous approval certificates.

This demand, or warrant, is dated December 5th, 1910, the day before the notice was given.

The Referee found (p. 144 Tr.):

“That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors and the Mayor, *are received by the Auditor and by him delivered to the person shown to be entitled thereto; who takes the same to the City Treasury, there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words ‘Received Payment’ printed upon the demand.*” (Italics ours.)

This is supported by the evidence (p. 250 Tr.).

The bill of complaint (p. 11 Tr.) states that the Metropolis Construction Company presented its verified demand and that it was approved by the Board of Public Works on December 5th, 1910.

The Referee found (p. 140 Tr.):

“That said warrant mentioned in said order”  
\* \* \* “is the same demand that is sued for in this action.”

The statements that “the claims or demands remained in the name of, *payable to*, THE CONSTRUCTION COMPANY”, “the warrants were to be in the name of the construction company”, “the bank (upon receipt of the warrant) would thereupon be in possession of a check payable to the construction company” are misleading.

As stated above the warrant or demand is merely a verified bill of the construction company attached to a printed form upon which numerous certificates of approval are endorsed.



No payee is mentioned anywhere in the demand. The city officials merely approve it as presented and then give it to the person entitled to it. They do not make out a check or recite to whom payment will be made.

A great part of the brief deals with surrender of control. The argument is based exclusively upon the wording of the order on the Auditor and the aforementioned statement of De Figueiredo. We have shown that the forced construction placed on the order amounts to merely a quibble; and that the statement of De Figueiredo, when given in full, shows no such intention as that contended for.

In *re Cramond*, 145 F. 966, is a case which throws some light on this subject. There we find the following quotation:

“To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a *complete and present right* on the party meant to be provided for, even where the circumstance *does not admit of its immediate exercise.*” (Italics ours.)

This citation is taken from

*Christmas v. Russell*, 14 Wall. 69.

Referring to *Christmas v. Russell*, we find that the evidence relied on to support the alleged lien consisted of a series of letters, containing *promises* to pay a certain judgment, if affirmed, out of the proceeds of promissory note; or to send the note, if not sold, to the recipient of the letters, who was a

surety on an appeal bond. That was the evidence—Christmas did nothing beyond *promising* to see his surety protected. The note was later transferred by Christmas to his son. The last letter refers to the transfer, and winds up

“In this I hope I have not lost sight of my purpose to protect you.”

The Court held that the letters contained nothing which by construction or otherwise could have any effect as a transfer. At most they were only evidence of a promise to pay. The letters show on their face that Christmas retained full dominion over the note. Of course, there was no surrender of control. The opinion must be read in the light cast upon it by the facts of the case.

Appellants cite

Commercial National Bank v. Portland, 60  
P. 563; 37 Or. 33,

to the point that an order such as this, is not an equitable assignment, and prove their point in the usual way.

They omit to state that the order on the City Auditor provided that the warrants that were to be given to the alleged assignee were to be for amounts equal

“to the value of the lumber furnished by the Fuel Company and used in making said improvements, now under way, to be evidenced by bills presented by said company and approved by me.”

The company wanted a different order permitting delivery of warrants to it without any further act on part of Dill (the contractor), *but he refused to give such order.* The requirement that the contractor had to approve the bills, before amount due the fuel company could be determined, in this case, was fatal to the alleged assignment.

We quote the following from the opinion:

“And assuming that in this respect the order is sufficient to constitute an equitable assignment the fatal objection remains that it did not vest in the fuel company a present right to the warrants, or authorize the city recorder to deliver them without the further approval of Dill. It is only upon the presentation of bills for lumber approved by Dill that the city recorder is authorized, under this order, to deliver warrants to the fuel company. The contract was not complete. Something remained to be done in the future by Dill before the right of the company to the warrants should become absolute. The city could not be compelled to deliver to it any warrants until the bills had been approved by Dill.”

This case is therefore no authority supporting the point that an order directed to a City Recorder or Auditor to deliver warrants may not be an assignment, or that such order may be revoked.

In short, the order left with the recorder was simply a direction to him to draw warrants in favor of the Fuel Company *when* the contractor *approved* the *company's* *lumber bills.*

Hence, the dicta of the Court, that the person to whom the order was addressed was not the custo-



dian of the fund, are obiter. It is universally recognized that the assignee of the *means* of obtaining a fund is the assignee of the fund. Complainant, himself, has sued in this action for possession of a *paper demand*. Why? Because if he got the demand or the trustee got it for him, cashing it would be a mere matter of course.

But here we are not standing on the order alone, but on the whole transaction of December 6, 1910. The circumstances under which the loan was made, negative any other intent than that of an assignment. In

Fourth Street National Bank v. Yardley, 165  
U. S. 634,

Mr. Justice White reviews at great length *circumstances*—very similar to those of this case,—under which a check was given for a loan; and he concludes, that,

“it could not be reasonably conceived that the loan would have been made without reference to, and assignment of, the fund from which alone the hope of immediate payment was to be reasonably expected.”

In the course of his opinion the learned Chief Justice then said:

“The transaction, therefore, was a proposition to borrow on the one hand, accompanied with the disclosure that security was necessary and tendering the security, and on the other hand an acceptance of such proposal and an advance made on the faith of it.”

If we apply the reasoning of that case to this, there is no escape from the conclusion that the Bank is a bona fide assignee of the fund represented by the demand for said fourth progress payment; it cannot “reasonably be conceived” that the Bank loaned thirty thousand (\$30,000.00) dollars “without reference to, and assignment of,” the only fund out of which it could reasonably expect immediate payment.

The order on the Auditor is but one item of the whole transaction of December 6, 1910,—a means given by the company to the Bank to carry out the mutual understanding. When, from all the circumstances the *intent to transfer title* appears, that intent will prevail. *No writing* is necessary: *no notice* of the assignment is required to be given. These principles are fully supported by the following cases:

- Civil Code of California, Sec. 1052;
- Curtin v. Kowalski, 145 Cal. 431;
- McIntire v. Hauser, 131 Cal. 14;
- Smith v. Peck, 128 Cal. 530;
- Lawrence etc. Bank v. Kowalsky, 105 Cal. 43;
- Renton etc. Co. v. Monnier, 77 Cal. 457;
- Spain v. Hamilton’s Adm’s, 1 Wall. 604;
- 4 Cyc., 7, 37, 43;
- 9 Cyc., 588.

It is quite immaterial whether the assignment is legal or equitable. In any case, the assignee will be protected. In

Mitchell v. Winslow, 17 Fed. Cases, p. 533,

Mr. Justice Story states the universal rule as follows:

“It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intended to create a positive lien or charge upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy.”

While, as appellants claim, “the proof required of an assignment or transfer is the same in law as in equity”, we desire to call attention to the fact that in this State an assignment for security vests the legal title in the assignee.

“An assignment of a policy of life insurance as security for advances made and to be made by the assignee, vests the legal title to the policy in him. The remaining interest of the assignor is the right to receive what remains of the proceeds of the policy after the advances made by the assignee have been satisfied. Until such satisfaction the assignee cannot be compelled to surrender the policy.”

Syllabus (correctly stating the law) in case of *Gilman v. Curtis*, 66 Cal. 116 (In Bank).

This has been followed in the case of

*Widaman v. Hubbard*, 88 Fed. Rep., p. 812.

If, therefore, the facts of this case support the finding that the Bank has an assignment, then under the laws of California the legal title to the



fourth progress payment vested in the Bank, and surrender of control by the company followed as a matter of law.

In view of the law on this subject, as laid down by the courts, the conclusion of the Referee that

“There was in fact a surrender of control, in that the company was not in a position to collect the demand itself, it having parted with the right to receive the warrant, nor was it in a position to revoke the order upon the Auditor, the same having been given for a valuable consideration, nor to do anything by which it could control for its own use and benefit the claim due from the city. I believe that the control intended by the doctrine of equitable assignment is the retention by the assignor of some right over the fund which he is in a position to enforce, either for his own benefit or for the benefit of another” (p. 170 Tr.),

is a correct statement of principles. The above conclusion finds ample support in the evidence,—in fact is the only conclusion that can be drawn from the facts of the transaction.

In the facts of the case we find no *revocable promise*, no *revocable understanding*, but something actually *done* to carry out an understanding, upon the *doing* of which a *present valuable consideration* passed from the Bank to the company.

To assume that upon the facts of this case the order on the Auditor was *revocable* by the company, or that the *rights* acquired by the Bank in the transaction were *revocable* by the company, would be to fly in the face of reason. If not re-

vocable by the company, they of course were not revocable by anyone claiming through or under the company.

The facts relating to the transaction of December 6, 1910, and upon which the Bank bases its claim of assignment are set forth in the testimony on pages 221 to 249 of the transcript, and are reviewed in the opening pages of this brief. There is no dispute as to these facts. They were found by the Referee in his report of October 14, 1911 (pp. 93 to 101).

This report was agreeable to all parties and was confirmed by Judge De Haven on December 12, 1911 (p. 183 Tr.).

On the final hearing, appellants did not introduce any evidence, except as follows:

Counsel for complainant offered in evidence the report of the Referee of October 14, 1911, the memorandum opinion by Judge De Haven, dated December 12, 1911, and the "order approving report of Referee granting injunction, etc." made December 13, 1911. He then rested (pp. 263, 264 Tr.).

Thereafter on July 16, 1912, the Referee again reported the same facts as to the transaction of December 6, 1910 (pp. 134 to 143 Tr.).

No exception to any of these findings of facts was ever made, except as to the finding

"that when Chris Emille turned over said order to the bank he understood that it was an

assignment for the bank to draw the money from the treasury, that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein" (p. 179 Tr.).

This finding appears in both reports, but the exception to it was taken only in the exceptions to the report of July 12, 1912.

The appellants are inconsistent in attacking this finding, for it is one of the findings which, in their twelfth exception (p. 177 Tr. and p. 180 Tr.), they say "are now, and were then, undisputed facts and not findings upon any conflicting or contentious testimony."

The findings of fact relating to the transaction of December 6, 1912, being undisputed, with the one doubtful exception above noted, appellants deny that they constituted an assignment, by laying stress upon the wording of the order to the Auditor authorizing the Bank to draw the warrants. Because it does not in terms express a transfer they insist it merely creates an agency.

It is wholly immaterial that there is no writing in terms conveying the warrants to the Bank.

The relation of the parties, the circumstances surrounding them, what was done and said, all form a *single transaction*, from which the intention is to be deducted.

Every requirement of the Civil Code of California relating to the subject of assignment is present in the transaction under discussion.



To avoid unnecessary length in this brief we respectfully refer the Court to pages 167 and 168 of the transcript, where the code sections are fully set forth by the Referee.

It is, therefore, respectfully submitted, that the Bank had a good and valid assignment of the fourth progress payment on December 6, 1910.

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**REPLY TO APPELLANTS' POINT THREE.**

It appears from the bill of complaint of appellant Welles that this claim was allowed and approved by the Referee in bankruptcy as a secured claim. The trustee, the other appellant, represents the general creditors under the bankruptcy law. Hence, if the Bank's claim of assignment is well founded, this question of priority is one that affects the rights of Welles and the Bank, only.

Section 1184, Code of Civil Procedure of the State of California, set forth at pages 44 and 45 of appellants' brief, must determine the question of priority between Welles and the Bank. That this section entered into and became part of the contract between the city and the company is, as appellants contend, beyond all doubt.

In the interpretation of this statute, the only point of difference between the parties arises over the word "due" in the following portion: "\* \* \* and he (the person who contracted with the contractor) shall withhold from his contractor \* \* \*

sufficient *money due*, or that may become due to such contractor", etc. (italics ours).

Appellee bases its rights upon the ordinary meaning of the word *due*, as demanded by the text and as given to it by the Supreme Court of this State in the case of *The Newport Wharf and Lumber Company v. Drew*, 125 Cal. 585. The appellants, on the other hand, insist on reading the word *due* out of the section and substituting therefor the word *matured*, and on reading the word *money* out of the statute and substituting therefor the word *demand* or *warrant* (appellants' brief, p. 45).

This substitution of terms does not, however, help appellants, as we shall show that the facts and law in this case coincide exactly with the facts and law in the case of *The Newport Wharf and Lumber Company v. Drew*, *supra*, and that the points now made by appellants are involved and decided in that case.

Appellants' contention seems to be this: in order that money shall be due, it is necessary that the demand be in such shape that the holder thereof may go to the City Treasurer and demand *immediate payment*. This, we submit, is not the case.

Welles' right to priority depends entirely upon the "notices to withhold" which are provided for by Section 1184 of the Code of Civil Procedure of California.

A "notice to withhold" is held to be in the nature of a *garnishment*.

Newport Co. v. Drew, 125 Cal. 585, at page 589;

Bates v. Santa Barbara Co., 90 Cal. 543, at page 546;

Bianchi v. Hughes, 124 Cal. 24, at page 27;

Butler v. Ng Chung, 160 Cal. 435, at page 439.

It is operative only as to moneys then *due* or that may later *become due* to the contractor.

Butler v. Ng Chung, 160 Cal. 435, 439.

As to the moneys theretofore due and assigned by the contractor prior to the giving of such a notice, it is inoperative for the simple reason that such moneys are no longer *due* to the *contractor* but to the *assignee*.

It is true that a contractor cannot prevent the effect of a "withholding notice" as to any payments that may become due after such a notice is given by assigning his rights to such payments before they are due.

If therefore the fourth progress payment was due to the company on or before December 6, 1910, there can be no question but that it could assign it and its assignee would take title superior to any claims subsequently made by subcontractors by virtue of withholding notices under Section 1184 of the Code of Civil Procedure of California.



When money becomes due under a contract of this kind, is a matter to be determined by the terms of the contract and the provisions of the Charter of the City and County of San Francisco. The following sections are to be found in Chapter I of Article VI of the said Charter:

“Sec. 22. The work in this Article provided for must be done under the direction and to the satisfaction of the Board of Public Works; and the materials used must be in accordance with the specifications and be to the satisfaction of said Board, and all contracts provided for in this Article must contain a provision to that effect, \* \* \*”

“Sec. 11. Said Board (of Public Works) shall appoint a Civil Engineer \* \* \* who shall be designated the City Engineer. \* \* \* He shall perform all civil engineering and surveying in the prosecution of the public works and improvements done under the direction and supervision of said Board, and shall certify to the progress and completion of the same, \* \* \*”

(Only the portions deemed material are printed.)

To determine when the money became *due* from the city to the contractor, we must bear in mind that the indebtedness of the city is a different matter from the demands afterwards made out therefor; and that the Charter provisions governing *approval* and auditing of *demands* are not to be given any weight as determining when the money became *due*. They constitute the *manner of payment* merely.

This may be illustrated by reference to the following Charter provisions:

(Art. IV, Chap. II, Sec. 7.)

“Every demand \* \* \* must \* \* \* be presented to the Auditor, who shall satisfy himself whether the money is *legally due*, etc.” (Italics ours.)

Also (same section):

“Every *demand* \* \* \* shall \* \* \* show: \* \* \* 3. The fiscal year in which the *indebtedness was incurred*.” (Italics ours.)

It seems clear that no *indebtedness* could be incurred unless money was *due*, and that the indebtedness must *precede* and *give rise* to the *demand*.

The contract under consideration, and the Charter, require that the work “shall be done under the *direction* and to the *satisfaction* of the Board of Public Works.”

The contract provides, also, “progressive payments for said work to be made, as provided for in the specifications therefor.”

The specifications provide:

“In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated in the herein proposed work by the contractor.

\* \* \* \* \*

“*Upon each such estimate being made*, the City and County of San Francisco *will pay or cause to be paid* to the contractor in the manner pro-

vided by law, an amount equal to 75 per cent of said City Engineer's estimate" (pp. 135, 136 Tr.) (*Italics ours.*)

Hence, the fourth progress payments became due to the contractor upon the *estimates* being made by the Engineer and the Board of Works signifying their *satisfaction with the work*.

The fourth progress payment estimate was made by the City Engineer on December 3, 1910. This estimate was approved by the Board of Public Works on December 5, 1910. On the same day, the Board of Public Works by resolution, authorized a fourth progressive payment to said company, and a "Demand on the Treasury" in favor of the company for said payment was approved by the Board of Public Works.

On page 48 of their brief, appellants quote portions of the opinion from the case of *The Newport Co. v. Drew*, 125 Cal. pp. 589 and 590. But these excerpts are cut too short by appellants, and fail to convey the meaning of the Court. We here present more fully the portions of the opinion from which appellants quote. On page 589 the Court say:

"The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have *matured, before it is given, but which have not been made*, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment



is intercepted by the notice, but if he has already assigned them to a third party the notice will be inoperative to prevent their payment to such party. (Code Civ. Proc. Sec. 1184; *Bates v. Santa Barbara County*, 90 Cal. 543; *First National Bank v. Perris Irr. District*, 107 Cal. 55).” (Italics ours.)

On pages 589 and 590 the Court say:

“The provision in the contract for the payment of ninety per cent of the value of the materials used and labor performed ‘as the work progresses’, with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an estimate of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the *acceptance of the work* by the Trustees. The contract provided that the work should be done to the *satisfaction* of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the *obligation* of the state which had been created in favor of the contractors by the trustees *became complete*, and the right of the contractors to *immediate payment* *became vested* in them and was subject to their *disposition*.” (Italics ours.)

On page 592, is the following:

“Upon their (trustees) acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate.”

Hence we conclude that the *estimate* and *satisfaction with the work* were the elements which fixed the *obligation* to pay.

Hence, upon the completion, *estimate* and *acceptance* of the *work*, or any *progressive part thereof*, the *contract price*, or *proper portion thereof*, becomes immediately *due* and payable; thereafter, the *approval* of the *demand* for such price, or part thereof, is a plain *ministerial duty*.

The demand is nothing more than a bill presented to the city for the amount of the debt incurred (Art. III, Chap. III, Sec. 13), the form of which is prescribed by the Charter.

The distinction between the debt and the demand is further illustrated by the Newport case in this: The Court decide that upon the *estimate* of the superintendent and *acceptance* of the work by the trustees, the right to *immediate payment* vested in the contractors; but immediate payment could not be obtained. Reference to the Political Code of California then in force will show that the Controller *could not draw his warrant, until* the State Board of Examiners had *approved* the demand.

“Sec. 672. CONTROLLER NOT TO DRAW WARRANT FOR CLAIMS NOT AUDITED BY EXAMINERS. The Controller must not draw his warrant for any claim unless it has been approved by the board \* \* \*”

“Sec. 433. It is the duty of the Controller:  
\* \* \* 10. To audit all claims against the state in cases where there are sufficient provisions of law for the payment thereof. \* \* \*

17. To draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; \* \* \*"

All this required time and precluded any idea of *actual, immediate payment*, in point of fact. These steps may be regarded, however, as successive acts in the process of payment. The following language is pertinent here:

"The provision in the contract for the payment of the *contract price* in *Controller's warrants* on the State Treasurer *did not affect* this power of disposition, or *right to immediate payment*, or suspend its exercise until such warrants should be obtained. The failure or neglect to obtain a warrant *immediately* upon the *approval* of the estimates would have no greater effect than a similar failure on the part of the contractor, in case of an ordinary building contract, to obtain a *check* from the owner *immediately* upon receiving the architect's certificate that the installment is payable." (Italics ours.)

The Newport Co. v. Drew, 125 Cal. 590.

The Board of Examiners act in the same capacity on claims against the state as do our Board of Supervisors on claims against the city, and the Controller acts in the same capacity as our Auditor. Yet, in the Newport case the Court decide that the approval of the Board of Examiners was not required to make the demand due. This was necessarily decided, for the reason that the appellant strenuously contended that no money was *due* to the contractors *until the warrants were issued* (see briefs on file in State Library).



The *measure* and *approval* of the work *create* the indebtedness and *fix* the obligation of the city to pay; the approval of the demand authorizes the Treasurer to disburse the money.

Under the law, therefore, there was no *part* of the fund upon which the notice of Welles could operate. In the case of

First National Bank v. Perris Irrigation  
District, 107 Cal. 62,

the Court say:

“If the contractor, previous to the giving of the notice (under said Sec. 1184) has transferred to another, who takes the assignment for value and without notice of the latent equities of the materialmen, the amount then actually due and payable on the contract, there is nothing either due or to become due to him, and there is no fund on which the notice can operate.”

In this case the Board of Public Works occupies the same position as the trustees, and the City Engineer the same position as the superintendent of construction, in the Newport case. It is to be noted that the trustees in the Newport case had the right to *approve payments* under that contract and they were also the parties to be *satisfied* with the *work*. In them, under the law and the contract, were centered the two functions of *accepting the work* and *approving the payments therefor*. In the case at bar the law and the contract require the work to be done to the *satisfaction* of the *Board of Public*

*Works,—not* to the satisfaction of the *Board of Supervisors*. When the Board of Public Works *accepts the work*, and declares its satisfaction therewith by resolution, *then* the Board of Supervisors approves *payment* of the demand.

To understand the decision in the Newport case, it is essential to keep in mind the *dual* capacity in which the trustees acted. The distinction between the trustees' approval of the *work* and their approval of the *payments* is constantly referred to throughout the decision. When, by any act, they signified their *approval of the work*, the *right of the contractors* to immediate payment *became vested* in them.

We also call particular attention to the following extract from the case of the Newport Co. v. Drew, *Supra*, p. 592:

“By the terms of the contract the work was to be done to the *satisfaction* of the board of trustees, as well as that of the superintendent of construction, and the *approval* by the *trustees* of the several *estimates* when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work and to determine its conformity with the terms of the contract, while the function of fixing the amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. *Upon their acceptance of the work* the contractor became *immediately entitled* to the *payment* of the amount of the *estimate*.” (Italics ours.)

The statement of appellants that the approval of the demand by the Board of Supervisors was necessary to make the money due, is not supported by the Charter. The Board of Public Works is the body under the Charter to *make the contract* on behalf of the city, and to *fix the city's obligations to pay money* thereunder.

The auditing and approval by the several persons and bodies thereafter are only the prescribed steps in the liquidation of the debt. If money is due from a private corporation, it does not follow that the creditor can go into its office and compel immediate payment, if the laws of the corporation provide for auditing. The principle is the same here. The auditing and approval are ministerial duties, except in so far as they may act as checks upon an unlawful expenditure of funds by the departments.

Sec. 19 (of Article II, Chapter I) provides:

“Except as provided in Chapter III of Article III of this Charter, all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the Treasurer, be first approved by the Board of Supervisors. All demands for more than two hundred dollars shall be presented to the Mayor for his approval, in the manner hereinbefore provided for the passage of bills or resolutions. All resolutions directing the payment of money other than salaries or wages, when the amount exceeds five hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper.”



The object of the Charter, by requiring different formalities for different amounts, is very apparent. It is not, as appellants contend, to give materialmen and laborers a chance to file liens, because, in the first place, they cannot file claims of lien against public works; and because, in the second place, they could, under Section 1184 of the Code of Civil Procedure, give their notices to withhold *before* they started to furnish material or perform their labor. The intent of the Charter is to give the citizens a chance to protest in case it should appear that the departments are unlawfully expending the public money.

An opinion of Hon. Franklin K. Lane, written while he was our City Attorney, throws a clear light upon the functions of the Supervisors in these matters:

“The duty imposed upon the Board of Supervisors of approving all demands upon the funds set aside for departments which are given exclusive control over their appropriations is of purely ministerial character, except in so far as it acts as a check upon such departments against the expenditure of more than its appropriation permits, or protects the city and county against expenditures of an unlawful character. The Board of Supervisors, at the beginning of each fiscal year, must set aside appropriations for the departments named, and at such time may, by the appropriations so made, limit and control the expenditure of such departments for such fiscal year. But, after such appropriation has been made, responsibility for its expenditure rests entirely on the

department to which it is allotted. The legislative department provides the funds, the administrative departments expend them, and each is to be held responsible within its own province. The administrative departments are made responsible for the manner in which the moneys so appropriated are used." (Opinions of ex-City Attorney Franklin K. Lane [1899-1902], pp. 180, 182—Charter of San Francisco, annotated by W. S. Church, p. 22.)

The contention of appellants that payments *might be withheld* by the city is immaterial in this suit, as appellants do not claim under the city, but under the Metropolis Construction Company.

In conclusion, we desire to state that Welles, in his bill of complaint (p. 10 Tr.), alleges that this fourth progress payment became due on December 5, 1910, on estimate by the City Engineer and approval by the Board of Public Works, by its resolution duly made and adopted.

For all of which reasons the decree herein should be affirmed.

San Francisco, California,

October 27, 1913.

Respectfully submitted,

GEORGE A. KNIGHT,  
CHARLES J. HEGGERTY,  
JAMES B. FEEHAN,  
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*Attorneys for Appellee.*





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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES, and JOHN DANIEL,  
Trustee of Metropolis Construction  
Company (a corporation), Bankrupt,  
*Appellants,*

vs.

PORTUGUESE-AMERICAN BANK OF SAN  
FRANCISCO (a corporation),  
*Appellee.*

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## APPELLANTS' REPLY BRIEF.

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I.

### Off the Record.

Counsel seeks to create an impression that one of the reasons urged by appellant in the trial court, against the validity of the bank's claim to an assignment, was really abandoned before the referee by quoting, from a typewritten brief of counsel for appellant Welles, a statement made by counsel in argument.

Such remarks are *off the record* and not before the court. If the court can consider such matter, it must then, also, consider other matters off the record, because, a statement of counsel, particularly one in *argument*, only must be considered (if deemed of any effect at all) in the light of its environment or surrounding circumstances. At all events the words in question were not participated in by appellant John Daniel, who appeared by separate counsel.

#### POINT RAISED AND DECIDED.

Notwithstanding the remarks of counsel for Mr. Welles, quoted from the typewritten argument filed before the referee, to the effect that counsel did not contend that the demand could not be assigned without consent, the contention was *theretofore*, and, also, *thereafter* presented and urged by counsel both for Welles and the appellant, John Daniel, trustee, etc.; and the remarks were used merely to call sharp attention to the argument *then* under discussion by eliminating, *for the time*, all other thoughts from discussion—but were not made with any idea of abandonment of such other thoughts.

#### THE CONTENTION WAS NEVER ABANDONED.

This legal objection to the existence of a valid assignment was raised on oral argument and in the briefs filed prior to February 15th and presented orally to the referee. Proof of this is con-



tained in a statement of opposing counsel in a brief dated February 2, 1913, as follows:

*“To defeat the intention of the parties, and the inevitable conclusion forced by the findings of fact, the complainant contends that the demand and payment could not be assigned without the consent of the Board of Public Works, which consent was not obtained, and that in a former transaction of like kind between the same parties the Company reserved the right to endorse the demand.”*

Moreover, the referee frankly and at a time before either of these briefs were filed, disagreed with counsel for Welles who had presented the contention as a reason for holding that the bank had no legal or valid assignment, taking the view finally expressed by him in his final report as a reason for upholding the legality and validity of the assignment, namely; that the objection could be raised only by the city.

It was then that counsel, realizing that it was useless and unnecessary that he should waste time or argument on a legal position once ruled adversely to him by continually re-asserting it, so stating to the referee, and desiring for the sake of brevity to confine his arguments to points not ruled upon, made the remark in argument to which appellee attempts now to attach importance.

Therefore the language quoted, and made much of, by appellee, was only used by appellant's counsel in arguing another and *different* legal position,

and merely for emphasis *in order to direct the referee's attention* to the exact point under discussion by eliminating, *for the time*, the point already ruled upon by the referee.

*Thereafter*, on the referee's first and second reports the decisions were *in favor* of Welles.

*Thereafter*, on the hearings upon the third and final reference to the referee, however, the objection was again presented and urged and, to the referee, counsel presented the position and stated that he desired to reserve the point notwithstanding the referee's decided views concerning the law governing.

*These matters are outside the record* as, also, of course, is the statement of counsel referred to in appellee's brief, and which in the light of the circumstances under which it was made, appears to have been merely argumentative—not to have been an abandonment of the contention that the failure to obtain consent was one of the reasons why the court could not find a legal or valid assignment in favor of the bank.

Some proof tending to show the correctness of these statements, *off the record*, is found in the record, in that the record shows that during the proceedings on the final hearing before the referee, counsel for Welles did make an oral argument and urged certain objections (not appearing) *which he did not waive*.

“Mr. FROST. (*After argument*) Without waiving my objections, I will make this stipulation,” etc. (Tr. p. 266).

But, that the discussion then undoubtedly involved this very question is shown by the fact that the record shows that counsel for the bank, *immediately thereafter*, used the “stipulation” given by counsel for Welles to introduce in evidence the full text of that portion of the contract specifications containing the prohibition against assignment without consent, and which could have no other possible bearing on the case than with reference to the position in question and the mere introduction of which by the bank at this time is sufficient evidence that the subject was one of the issues then involved in the case (Tr. pp. 268, 269).

And that this general subject of “consent” was then before the court is also proven by the fact that on the said hearing the bank’s counsel asked and obtained a stipulation to the effect that *Welles* had not obtained *formal* consent, although acting with the knowledge of the board, etc. (Tr. p. 271).

Also, further proof that the contention was never abandoned at all is found in the fact that the referee did not so regard it, but treated it as a legal proposition for first consideration on the two main questions presented in his report (Tr. p. 152) and that he considered and decided it in his report (Tr. p. 137, p. 152) finally concluding after thrusting the position aside (Tr. p. 171) and as his



conclusion on that subject that the fourth progressive payment "was on the 6th day of December, 1910, assigned" etc.

Counsel is not surprised at what seems a rather *sophisticated* attempt by appellee's counsel, to prevent the consideration of a legal argument fatal to their case. But the attempt is not well taken.

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(B)

**EXCEPTIONS TO REPORT.**

Exceptions to the referee's conclusions holding the bank to have received a legal or valid or any assignment on December 6th, or any *right*, were made.

The conclusions of the referee are (Tr. pp. 171, 172)

"That the fourth progressive payment in the sum of \$6830.85 was on the 6th day of December, 1910, assigned by the company to the bank as security for the repayment of loans amounting to \$35,000 made by the bank to the company, and that said assignment and the right of the bank to receive the moneys due upon said fourth progressive payment are not affected by the notice to withhold made by complainant."

In the beginning of his decision the referee states the questions arising in two paragraphs as follows (Tr. p. 152):

"There are two main questions presented. First, whether the fourth progressive pay-

ment in question was due to the company and was the proper subject of an assignment when the alleged assignment to the bank was made.

Second, does the evidence show that an assignment took place.”

*And under these two questions he considered and disposed of all the legal arguments and reasons urged by counsel including the one about consent, and many others!*

Following on page 171 of the transcript is his answer or conclusion as to these questions as herein above quoted.

What is in between, *including what is said about “consent” under the contract*, is by way of argument and reasoning leading up to his final conclusion, and might be left out without detracting from the legal sufficiency of the report.

*In this part the paragraphs are not segregated or numbered.*

It shows, however, that the referee heard and decided the legal position in question, in the manner we have indicated.

In the trial court the hearing took the form as presented by the referee.

*In presenting exceptions counsel properly and naturally followed the form of presentation adopted by the referee and raised the question of the legality, validity and sufficiency of the referee’s conclusions in every available way.*

Appellants excepted to the referee's report in that the referee concluded that the bank received a legal title to the fourth progressive payment (Sixth Exception, Tr. p. 175).

Also because the referee had erroneously concluded that the payment in question was assigned to the bank (Seventh Exception).

Also on the ground that the transactions of December sixth conferred upon the bank, at most, merely a right to receive the warrant, and that the referee should have so concluded (Eighth Exception, Tr. p. 176).

Also upon the ground that the referee should have concluded that any right which the bank may have acquired was subject to the rights of the trustee in bankruptcy (Eleventh Exception, Tr. p. 177).

Also to the findings of the referee that the Construction Company did assign the fourth progressive payment to the bank and to the conclusion of law that the authorization to the auditor constituted a legal or equitable assignment (Exceptions 2 and 3, Tr. pp. 180 and 181).

*If the trial court were of the opinion that failure of the bank to obtain consent operated to prevent a legal or valid assignment, or any right passing to the bank, it must have reversed the referee's conclusions and held each of these exceptions well taken!*

This is a sufficient test.



It is difficult to conceive how appellants could have more adequately excepted to the conclusions of the referee.

---

(C)

**SPECIFICATIONS OF ERROR.**

Concerning what was heard and determined by Judge Dietrich, we have at least, this record:

The conclusions of the referee were before him, (with the reasons therefor in an opinion dealing with every phase of the case) and the exceptions to the referee's conclusions were before him.

"Upon consideration", as the court himself said, (Tr. p. 183) of these, the report was approved and it is decreed "That the exceptions, and each of them \* \* \* are overruled, and the said report be \* \* \* in all respect confirmed" (Tr. p. 187).

And to this decision of the court, specifications of error fully covering the referee's conclusions (his report and exceptions thereto) were made, as follows: The action of the court in overruling each of appellants' exceptions to the report of the referee was specified as error (Exception 1, Tr. p. 192 and p. 200).

More than this, the conclusions of the referee were also specifically covered by the following specifications:

A specification that the court erred in not holding that the fourth progressive payment was not assigned (Specification 6, Tr. p. 194, and p. 201).

Also that the court erred in not holding that any right which the bank may have acquired was subject to the rights of the trustee in bankruptcy (Specification 10, Tr. p. 194 and p. 201).

Also that the court erred in holding that the bank had any right whatever, paramount to the right of complainant Welles, to the warrant or its proceeds (Specifications 16, Tr. p. 196 and p. 203).

Also that the court erred in making a decree that the bank had a good and valid assignment to the fourth progressive payment and the demand therefor and is the owner thereof, etc. (Specification 17, Tr. p. 196 and p. 203).

Also that the court erred in making a decree that the defendant bank have and recover from the trustee the demand for said fourth progressive payment in the sum of six thousand eight hundred thirty dollars and eighty-five cents (Specification 19, Tr. p. 196 and p. 204).

Thus bringing before *this court* what had been heard and decided by the trial court, to wit: the report of the referee, his findings and conclusions, and the action and decision of the lower court thereon.

It is difficult to conceive how the errors complained of by the appellants could have been raised

either by exceptions or specifications of error any more effectively, as a matter of law, than they are in the foregoing.

That these exceptions and specifications were intended to cover the point in question is shown by the fact that the question of equitable assignment and of failure to obtain "control" is raised *separately* by the Fifth, Thirteenth and Fourteenth Exceptions. Again, *separately*, by the Fourth, Twelfth, Thirteenth, Fourteenth and Fifteenth Specifications of Error; *which are distinct and separate from the exceptions and specifications hereinabove relied on to bring up the question of validity on the ground of failure to obtain "consent"!* The word "consent" itself is not used *because the Referee himself stated the case and his conclusions* (embracing the point) *without using that word.*

The position has been shown to have been expressly and positively presented to the referee, decided by him in his report and conclusions, and fully excepted to by appellants; to have been necessarily before him, to have been decided by him, to have been decided by the decree overruling appellants' exceptions and approving the referee's report and conclusions, and brought here by proper specifications of error.

That these are matters necessarily to be heard and determined by this court, is considered, therefore, to have been proved *by the record!*



## II.

## “Collecting the Money”—A Correction.

An error in quoting from the transcript is seized upon by appellee in the brief, at page 25 and made much of. For this we find no fault in them.

Appellants would like to point out, however, that the error is inconsequential because the conclusion sought to be drawn from it by appellees, to wit: that there is no evidence that Mr. Strong collected the money, is not justified. It is not justified because the evidence shows that L. F. Strong was the company's assistant secretary or agent and for the following reasons. The testimony referred to is of Strong himself and is as follows:

“At that meeting” (referring to the time when the loan was made), “I was acting in the capacity of assistant secretary. At that time and subsequently during the year 1910, I was doing the duties of *secretary* of the Metropolis Construction Company. Mrs. Emille, the regular secretary, was not active during the year 1910 as secretary of the company. I performed the actual duties of secretary of the Metropolis Construction Company subsequent to January first, 1910, and during the year 1910” (Tr. pp. 231 and 232).

An oath in the main body of the demand declares Strong to be the “duly authorized agent” of the Construction Company (Tr. p. 214).

“L. F. Strong, being first duly sworn, deposes and says: that he is a duly authorized agent of the party, requested to perform the work mentioned in the foregoing demand;  
\* \* \*”

It made no difference, therefore, whether the cashier of the bank was present or not, because the Construction Company and L. F. Strong, its *duly authorized agent*, only, could have received the money for the reason that the demand was payable on its face to the company only. If Mr. de Figueiredo had gone there alone he *could not* have obtained it. If Mr. Strong had gone there alone he *could* have obtained it. The presence of de Figueiredo, or his absence, had nothing more to do with the payment of the money than did the presence of a messenger boy, because it was the signature of L. F. Strong, the "*duly authorized agent*" of the Construction Company that the treasurer had to have.

Counsel in his brief (p. 31) says:

"It does not follow that because the company's agent receipted for the demands his receipt was necessary in order to get the money from the treasury."

But it was necessary in this case at least because the company or its authorized agent (and Strong was its "authorized agent" on the face of the demand) was the only "person shown to be entitled" according to the finding of the referee (Tr. p. 144) quoted by counsel for appellee (brief, p. 31).

This being so, *who had immediate control* of the money coming from the City Treasurer on the

Fourth Progress payments? The Construction Company or the bank?

The Construction Company!

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### III.

#### **“A Correct Inference”—A Refutation.**

In several places in appellee's brief it is alleged that the arguments of counsel are misleading. We will notice one such. On pages 10-12 appellee argues that the statement of appellant to the effect (our brief, p. 20) that the court evidently considered the bank should have an opportunity to produce “further proof on final hearing” as a reason for sending the case back to the referee a third time is erroneous.

The record, however, shows this inference to be quite correct, for the reason that on the hearing before the referee all the testimony taken upon the former hearing was offered and admitted by *stipulation* (Tr. p. 267) and the referee then made the announcement,

“The referee.—*Counsel for the Portuguese-American Bank* may introduce such further evidence upon issues raised by answer to the bill \* \* \*” (Tr. p. 267).

Followed by the actual introduction by counsel for that bank (Tr. p. 268) of some documentary evidence.



Which shows, apparently, that the purpose of the order *was* to give the bank opportunity to introduce testimony under its answer, that the referee so construed it, and that counsel for the bank not only *so* understood it, but *so* used it.

---

#### IV.

#### The Merits—A Summary.

##### A.

##### ANOTHER REFUTATION.

Counsel states (p. 17) that appellant's contention that the ruling of Judge DeHaven subsequently became the law of the case was submitted to Judge DeHaven and by him overruled. This is incorrect. The exact point was not made or submitted to Judge DeHaven, or considered by him at all. Appellants did argue that the findings of the referee were *res adjudicata*, but it was only after these findings came back to court undisturbed and unchanged, before Judge Dietrich that they became the "law of the case". The point is covered in appellants' brief, page 20.

---

##### (B)

##### ASSIGNMENT.

Appellee's reply to appellants' point one is based upon only one authority which is in point, aside

from some general language in the text book of Jones. This is the case of *Fortunato v. Patten*. It is cited three times on two pages (pp. 21 and 22) of his brief but, nevertheless, it is only one case and is not the law in the United States nor in California.

Appellee's citation on page 21 from Jones, *Pledges and Coll. Securities*, is based *solely* on the *Fortunato* and other *New York* cases.

Jones on *Pledges* (Sec. 136a) cited by appellee on page 22, *begins by stating the law as contended for by appellants*, as follows:

“A contract which would otherwise be assignable *may be non-assignable without the consent of the adversary party*, by inserting a clause providing it shall not be assigned.”

Jones, *Pledges & Coll. Securities*, 3rd Edition, p. 143, Sec. 136a.

The cases of *Butler v. Rockwell* and *Crouse v. Mitchell* merely state the rule, not in question in this case, that where the provision is a general one and construed to be merely to prevent negotiability *of the contract* (as in the *Butler* case) or merely the ordinary provision against transfer without consent, in a lease (as in the *Crouse* case), an assignment as security will be recognized.

The California case of *Curtiss v. Aetna Life Ins. Co.* involved a policy which by its very terms was payable to Curtiss "or assigns".

The opinion in the *later* case in California cited on page 26 of appellants' brief (*Butler v. San Francisco G. & E. Co.*) is the last word on the subject in this state, as the case of *La Rue v. Groezinger*, before it, and as is the case of *Burck v. Taylor* in the United States.

Thus are the "authorities" cited by appellee reduced to the one New York case of *Fortunato v. Patten*, and cases on which it is based, cited by Jones in his work on Pledges; wherein we give our assent to appellee's contention (p. 27) that the law of *California* must govern this matter, (as against the decision in *Fortunato v. Patten*).

Appellee's construction of the contract clause itself (on pages 19 and 20 of its brief) is *so forced* as to be quite "apparent". It is reached by leaving out of consideration such words in the paragraph as "any"—"he shall not assign any of the moneys"—and the pronoun "his" wherein the paragraph says it is "his claim" (the *contractor's* claim) that must not be assigned.

As to appellants' "point two", it seems to us, that the absolute incapacity of anyone but the company or *its* authorized agent (Strong) to get the money from the treasury, and the consequent total



failure of the bank to have *control*, or of the company to have surrendered it, has been demonstrated, and stands proved.

The only answer made to this is (appellee's brief, p. 30) that Strong had signed previous warrants at the *suggestion* of Mr. de Figueiredo, cashier of the bank and it is left to our imagination that he would probably do so again.

We are not unaware of the alleged power of mental suggestion, but it has not yet become a recognized legal agency for the transfer of commercial paper.

#### FOURTH STREET BANK CASE.

The authority principally relied on by appellee—Fourth Street Bank v. Yardley, 165 U. S. 634—is distinguished by the fact that *a check* on the Tradesmen's Bank, the *fundholder*, payable to the Keystone Bank, the *assignee*, was made and *delivered* to the assignee at the time of the assignment, thus *surrendering complete control* by the assignor to the assignee. See Syllabus, 165 U. S., p. 635.

The case at bar presents none of the features of such a situation.

In the case at bar complete control of the *fund* in the hands of the *fundholder* was not surrendered in any manner whatever.

## BANK V. PORTLAND.

An “order” (which in the case at bar was *not* even an order) on the city auditor—not the *fundholder*, is no more effectual than the “order” on the “city recorder” in the case of Bank v. Portland (37 Ore. 33), which the Oregon Supreme Court considered insufficient because it was not drawn upon the fundholder and contained no words of transfer.

The attempt of counsel to *distinguish* this Oregon case from the case at bar merely because the bills were to be approved by the assignor is not well taken, because, on *principle* the cases cannot be distinguished.

Page on Contracts (which appellee likes to quote as an authority) says of this matter:

“So, an order to a city official to deliver warrants to a specified company, is not an assignment of the fund against which such instruments are drawn”.

Page on Contracts, Vol. 3, p. 1965, Sec. 1278.

## McINTYRE V. HAUSER.

Furthermore, the case of McIntyre v. Hauser, cited by appellee (p. 28), is not an authority, because the language quoted is *obiter dictum*, for the reason that the court held in that case that the facts alleged in the complaint amounted to a *tri-partite* agreement, in effect a pure novation,

there being a writing in that case containing words of transfer, surrendering complete control to the assignee and binding on, and directed to the fundholder. Thus the case is to be distinguished from the case at bar, and is found not in point—not an authority.

For these reasons, therefore—on these two general grounds—it appears that the referee's conclusion that the bank had a legal and valid assignment is not well taken and should be reversed.

---

(C).

**PRIORITY.**

Concerning point three, appellants' contention (to summarize) is that even though the payment might have been due in a general sense, so as to make it generally assignable, such assignment if made (even though good as against a *later assignment*) is subject to be defeated by a "notice to withhold" at any time prior to the *maturity* of the payment, and that such is the true construction of the case of *Newport Co. v. Drew*.

Appellee's argument *begs* this question entirely, it seems to counsel, and is based upon the failure of the court below properly to construe the decision in the *Drew* case.



Again it is prayed that the prayer of appellants' opening brief should be granted.

San Francisco, California,

November 5, 1913.

Respectfully submitted,

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P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

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*Counsel for Appellant, John Daniel,  
trustee, of Metropolis Construction  
Company (a corporation), bankrupt.*

C. A. S. FROST,

*Counsel for Appellant, Paul I. Welles.*



No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

PAUL I. WELLES, and JOHN DANIEL, Trustee  
of Metropolis Construction Company (a  
corporation), Bankrupt,

*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-  
CISCO (a corporation),

*Appellee.*

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## APPELLEE'S REPLY TO NEW MATTER AND ERRONEOUS STATEMENTS IN APPELLANTS' REPLY BRIEF.

(Divisions refer to those of Appellants' Reply Brief.)

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### ERRONEOUS STATEMENTS UNDER DIVISION I.

Under the title "Off the Record", appellants' counsel in their reply brief accuse counsel for appellee of a *sophisticated* attempt to prevent the consideration of a legal argument.

Counsel for appellants admit the use of the following language, quoted by us from page 16 of the brief of Mr. Welles (who was the sole complainant



in this action), dated February 15, 1912, and filed on the hearing before the Referee:

“It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank has wasted its discussion of that point, on pages 4, 5 and 6 of the brief.”

They now seek to explain away their very apparent and positive abandonment at that time of “point one” of their opening brief on appeal; and, in doing so, fall into very serious error in their statement of *facts*.

In the first place, appellants’ counsel attempt to show the circumstances under which the statement in Mr. Welles’ brief of February 15, 1912, was made, and to show that this point was never abandoned. We do not agree with their statement of the circumstances, but we will confine ourselves to the printed record and undisputed matter in replying to it.

Counsel for appellants quote from a brief of appellee, alleged by them to bear the date February 2, 1913. The final decree in this cause was made *prior to that date*. The brief from which the quotation is taken is dated February 2, 1912. We agree with appellants’ counsel that prior to this *last date* this point was raised. The assumption on our part that it would be raised again, accounts for our discussion of it in the brief of February 2, 1912. Then on February 15, 1912, the point is not only

abandoned, but counsel for Mr. Welles sharply inform all concerned that "the Bank has wasted its discussion of that point".

In the second place, counsel for appellants make the statement, on page 4 of their reply brief, that

*"Thereafter, on the hearings upon the third and final reference to the referee, however, the objection was again presented and urged"* etc.

To offer some proof in the record tending to show the correctness of this statement, counsel refers to pages 266, 268, 269 and 271 of the transcript.

An examination of the transcript shows that all the matters and proceedings set forth at pages 266, 268, 269 and 271, referred to by appellants, took place on *January 9th and 17th, 1912*, pursuant to an order of reference of *December 26, 1911* (p. 263 Tr.), and *not* on the *third* reference which was pursuant to the order of *April 15, 1912* (p. 132 Tr.). Furthermore, there was *no* hearing on the third reference (pp. 132, 133 Tr.).

### (C.)

At page 11 reply brief, to excuse the absence of a specific exception, counsel for appellants say: "The word '*consent*' itself is not used *because the Referee himself stated the case and his conclusions* (embracing the point) *without using that word.*"

This is an astonishing statement in view of the fact that the Referee uses the word "consent" *three times* in discussing the very point (p. 152 Tr.).

It may be admitted that counsel for appellee went off the *printed record* by referring to appellants' brief of February 15, 1912, for the purpose of calling attention to the fact that the point now urged by appellants, to wit: that the assignment of the moneys due under the contract was void for lack of consent by the city, was abandoned before the lower Court.

But, while admitting that we went outside the *printed record*, we insist that we are within the *whole record*, and within our rights in view of the powers of this Court under

Equity Rule 76 (as promulgated November 4, 1912).

In view of the supposed decision of the District Court of Appeal of California in *Butler v. San Francisco G. & E. Co.*, this technical point is made much of in appellants' opening brief, and it is only natural that counsel for appellee should not have anticipated the resurrection of a dead issue. Under these circumstances it would seem eminently proper to invoke the aid of the above rule.

But as appellants' counsel admit the portion of the brief quoted by us, and as that portion only is material here, it may not be necessary to invoke the rule.

The point then is, not that counsel for appellee are making a *sophisticated* attempt to prevent argument of "point one," but, that appellants have by their own deliberate and positive attitude estopped themselves from raising the point on appeal.



## ERRONEOUS STATEMENTS UNDER DIVISION II.

Counsel for appellants, at page 12 of their reply brief, designate a very peculiar misstatement of facts made at page 41 of their opening brief, as an “error in quoting from the transcript”. They then proceed to extenuate the “error” by showing that counsel for appellee were not justified in concluding therefrom that there was no evidence that Mr. Strong collected the money. Counsel fall from error into error. No such conclusion was drawn, as an examination of appellee’s brief will show. Counsel for appellee draw no *conclusions* from the “error”, or from any other source: they state *facts*. They state that there is *no evidence* supporting the italicized “error” of appellants’ counsel; and they state the *testimony* showing that the *Bank’s cashier and not Mr. Strong received the money*. These are not conclusions from “error”, but facts from the record.

The new matter quoted by appellants’ counsel at page 12 of their reply brief, tending to show that Mr. Strong held the position of assistant secretary and agent of the company, supports a fact which has never been disputed. But when they follow that up on the next page, with the statement that the receipt of the company’s agent was necessary in order to get the money from the treasury,

“because the company or its authorized agent (and Strong was its ‘authorized agent’ on the face of the demand) was the only ‘person shown to be entitled’ according to the finding of the referee (p. 144 Tr.),” etc.,

they make a statement which is misleading, in that it insinuates that the Referee made some finding supporting it.

On the contrary, there is no finding that the company or its authorized agent was the only "person shown to be entitled", or that it or its agent was entitled to receive the demand or the money. The finding referred to, and which is mutilated to meet the needs of appellants, is as follows:

"That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto" (p. 144 Tr.).

The Referee also found (bottom of p. 144 Tr.):

"The cashier received from the Auditor the paper demands for the third progressive payments, such demands being made in the name of the Metropolis Construction Company when delivered to the cashier."

#### **ERRONEOUS STATEMENTS UNDER DIVISION III.**

Appellants' counsel state, page 14 reply brief, that the record sustains the inference that the Court below considered that the Bank should have an opportunity to produce "further proof on final hearing", as a reason for sending the case back to the Referee a third time. To support this statement they refer to pages 267 and 268 of the transcript. An examination of these pages in conjunction with page 263 shows that the proceedings re-

ferred to were had on *January 9th and 17th, 1912*; while the case was sent back the *third* time on *April 15, 1912*, and no additional evidence was introduced on the third reference (pp. 132, 133 Tr.).

#### ERRONEOUS STATEMENTS UNDER DIVISION IV.

##### (A.)

Counsel for appellants state, page 15 reply brief, that their contention that the ruling of Judge De Haven became the law of the case, was not submitted to, nor overruled by Judge De Haven, nor considered by him at all; and that our statement that it was is incorrect. Let us go to the record.

On March 8, 1912, the Referee filed his second report, wherein he found, as a conclusion, that because the facts remain unchanged the memorandum opinion of December 12, 1911, governed, and that if Welles was entitled to the relief demanded in his bill on December 12, 1911, he was entitled to the same relief on March 8, 1912 (p. 124 Tr.). To this conclusion of the Referee the Bank filed exception (p. 126 Tr. "Fourth"). The report and exceptions came on for hearing before Judge De Haven on April 15, 1912, and the case was sent back for the third time with instructions to the Referee to report his findings and conclusions without reference to former proceedings (p. 128 Tr.). Thus it will be seen that Judge De Haven had the *very point* before him, and must necessarily have passed on it.



(B.)

Counsel for appellants refer to the case of *Butler v. San Francisco G. & E. Co.*, on page 17 reply brief, as “the last word on the subject in this State”. Although the case does not involve the validity of an assignment for security, or of money earned, it again becomes our duty to point out the *fact* that this case is *not* the last word, but is still *undecided*, and that a *rehearing* has been granted by the Supreme Court.

In the foregoing pages counsel have tried to refrain from anything in the nature of reply argument except where new matter is introduced, and to confine themselves to pointing out distorted or misstated facts.

San Francisco, California,

November 10, 1913.

Respectfully submitted,

GEO. A. KNIGHT,

CHAS. J. HEGGERTY,

JAMES B. FEEHAN,

JOSEPH W. BERETTA,

*Attorneys for Appellee.*



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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES and JOHN DANIEL,  
Trustee of METROPOLIS CONSTRUCTION  
COMPANY (a corporation), bankrupt,  
*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF  
SAN FRANCISCO (a corporation),  
*Appellee.*

## APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

---

Appellants respectfully submit their reply to the appellee's petition for a rehearing.

### I.

#### APPELLEE'S STATEMENTS ENTIRELY OFF THE RECORD.

According to the petition for a rehearing, mention was made of the point on which the judgment of the court below is reversed in briefs that were

filed in February and August, 1912; but, it is alleged, "the point was never again mentioned directly or indirectly then or thereafter; and was never urged *in its present form*" until after the transcript had been filed in this court. *None of this is in the record.*

Another palpably uncertain statement appears on page 11 of the petition where it is stated that the point was never raised in the court below.

These statements and statements of like import in the petition are *entirely outside the record* and are *absolutely unsupported by the record!*

Not only is counsel's position in this respect unsupported by the *record*, but *the contrary is shown by the record to be true!* The record shows that the exact point was heard (Tr. p. 152) and decided (Tr. pp. 171, 172) by the referee.

The finding of the referee (p. 152) adopted by the court (pp. 183, 185 and 187) is:

"The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city."

The record also shows that this report came before the court upon proper exceptions, was con-

sidered by the court (Tr. p. 183) and the exceptions overruled and the report in all respects confirmed (Tr. p. 187). The action of the court in overruling each of appellants' exceptions to the report of referee was assigned as error (Tr. pp. 192-205) and the matter brought before this court upon proper specifications. The parties *argued this matter fully* on the original hearing and what is said in the petition is *mostly a rehashment of arguments made in the briefs on file!* As the arguments *occupied a prominent place in the briefs* it should be assumed that the court did not overlook it.

Rosenstirn v. U. S. 171 Fed. 71; 96 C. C. A. 175, 177.

See

Appellants' Reply Brief, pp. 1 to 10 inclusive, devoted exclusively to a presentation of these matters; also,

Appellee's Brief, pp. 18, 19;

Appellee's Reply to New Matter, pp. 1 to 4, inclusive.

The statements alleged to have been made by counsel in argument of the case are *not in the record at all!*

If the arguments alleged to have been made by counsel in a brief were made, they were, of course, made by way of argument only.



The record, not the briefs of appellants' counsel outside the record, nor statements of counsel for appellee also outside the record, as to what arguments were made, is, of course, the only thing the court ought to consider.

The court having read appellee's *off-the-record* statement-arguments (or such of them as were presented on the original hearing), having decided the plea in abatement against him, and then *having considered the case on the merits and decided that, also*, against appellee; the rehashment of the alleged matter in abatement in the petition for rehearing is entirely out of place and should be disregarded.

Nor was the alleged excerpt from appellants' brief which appears on page 4 of appellee's petition for rehearing called to the attention of this court on the original hearing in any manner!

*Therefore, it should not be considered on the petition for a rehearing, even if it were in the record.*

Reece Folding Mach. Co. v. Fenwick, 72  
C. C. A. 43, 44.

Even if appellee's assertions were all true and supported by the record, this court has the option to notice a plain error, not assigned, under its rules; and the action of the court in so doing would not be assailable from any standpoint counsel for appellee has assumed.

Rule 11, U. S. C. C. A. Ninth Circuit.

None of the matters mentioned, therefore, constitute any reason or ground whatever for granting a rehearing.

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## II.

### APPELLEE'S STATED REASONS INSUFFICIENT.

A rehearing is requested upon two grounds, *first, astonishment and surprise* alleged to have prevented appellee from bringing up a full and fair record; and, *second, novelty and unexpected importance* of the point upon which a decree herein has been reversed (petition for rehearing, pp. 1 and 2).

(A) The first ground alleged constitutes no reason for granting the petition because that counsel was surprised or professes astonishment at the result of the hearing does not constitute a legal ground or reason for reopening a cause; "*nor is it even persuasive that error has been committed*".

People v. Lake County Court, 26 Colo. 386, 391; 46 L. R. A. 850, 852.

Nor should a rehearing be granted because of the fear of counsel that by reason of their overconfidence in the strength of their position they failed sufficiently to present their cause. It is said on authority that to grant a rehearing for such reason would establish a "dangerous precedent".

State v. Woodbury, 30 Pac. (Nevada) 1006, 1011.

Errors or defects in the record do not constitute ground for granting a rehearing.

Bushman v. Nickels & Brown Bros., 1 Cal. App. 266-270.

Gen. A. F. & L. Assurance Corp. v. Lacey, 151 S. W. (Texas) 1170-1172.

Nor should a cause be reheard or reargued because of matters not in the record.

St. Louis & S. F. Ry. Co. v. Cartwright, 151 S. W. (Texas) 1094;  
3 Cyc., 214.

(B) The second ground advanced by counsel is not well taken, because it has long been settled that a rehearing will not be granted solely because questions of great importance are involved.

Camfield v. U. S., 67 Fed. 17.

Nor because other cases involving a large amount are pending in the courts, depending on the same questions as are found in the principal case.

Butler v. Walker, 80 Ill. 345, 350.

Therefore, the “*distinctly stated*” reasons put forth by appellee as his grounds for desiring a rehearing appear to be insufficient.

*The statement of these grounds constitutes a waiver of all others.*

Rule 29, U. S. C. C. A., Ninth Circuit;  
3 Cyc., 216;

Willson v. Broder, 24 Cal. 190, 192;

Kerr v. Hicks, 45 S. E. (North Carolina) 529.



Hence the petition for rehearing should be denied.

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### III.

#### PETITION IS MERE REARGUMENT.

The petition is a mere reargument of the case (except in so far as it attempts to suggest a diminution of the record) and should not, therefore, be entertained.

Suwannee & S. P. Ry. Co. v. West Coast Ry. Co., 39 So. (Fla.) 538, 539.

Counsel should assume that his points have *not* been overlooked, rather than that they have been!

Rosenstirn v. U. S., 171 Fed. 71; 96 C. C. A., 175, 177.

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### IV.

#### NO FOUNDATION LAID FOR REQUEST TO AMEND RECORD.

Appellee's request for permission to amend the record should not be granted because it is not properly brought before the court under the rule.

Rule 18, U. S. C. C. A., 9th Circuit.

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### V.

#### AMENDMENT NOT SHOWN TO BE POSSIBLE.

Nor does it appear that the matter appellee wishes to insert was ever made a part of the

statement of the case or of the evidence settled in the court below. Nor does it appear by certified copy that it could be now made part of such statement. Consequently, even if a motion to refer the record back for resettlement were made in this court (even before decision), it should, under the authorities, be denied.

Dow et al. v. U. S., 81 Fed. 1004; 27 C. C. A. 42.

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## VI.

### **MOTION, IF NOW MADE, WOULD BE TOO LATE.**

In addition to which the motion now made comes too late in any event. Such a motion should not be permitted after the first term of entry of the case (May, 1913)!

Rule 18, U. S. C. C. A., Ninth Circuit;  
St. Louis & S. F. Ry. Co. v. Cartwright,  
151 S. W. (Texas) 1094.

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## VII.

### **AND SUCH MOTION WOULD BE DENIED EVEN IF OMITTED MATTER HAD NOT BEEN OMITTED.**

Even if the alleged evidence had been incorporated in the statement and printed in the record, the failure of counsel to call attention to the omission on the original hearing would be sufficient ground for denying its petition.

Reece Folding Mach. Co. v. Fenwick, 72  
C. C. A. 43, 44.

## VIII.

## PETITION TO AMEND IS WITHOUT MERIT.

*Very special and exceptional circumstances* must be shown to obtain leave to have omissions or defects in a record on appeal or writ of error supplied after a case has once been decided and while an application for rehearing is pending.

3 Cyc., 214;

Black Hills Brewing Co. v. Middle West Fr. Ins. Co., 141 N. W. (S. D.) 358;

Rule 18, U. S. C. C. A., 9th Circuit.

In the case last cited the court quoted with approval the opinion of the court in

Ricks v. Bergsvenden, 8 N. D. 578, 580;  
80 N. W. 768, 770,

which we also beg leave to quote, as follows (italics are ours):

“On rehearing (Nov. 7, 1899).

In this action appellant's counsel has filed a petition for a rehearing, and in connection therewith has requested this court to withhold the remittitur, and to send down the record, to enable the appellant to apply to the district court for a resettlement of the so-called ‘statement of the case’, with a view of incorporating therein certain essential specifications which were omitted from the original record as transmitted to this court, and upon which the case was disposed of by this court. These requests, coming, as they do, after the case has been submitted and decided, and after an opinion has been written and filed, are not seasonably made. Without holding that this court is devoid of authority to grant such a request, under any possible state of facts, we



do, without hesitation, hold that similar requests will ordinarily be denied, *and will not be granted in any case, unless it presents features which are peculiar and very exceptional, and such as this case does not present.*"

Now there are no exceptional circumstances in this case in favor of appellee's petition to have the alleged evidence brought up.

On the contrary, the request is a mere afterthought, because *said alleged evidence was never mentioned by anyone connected with the case at any time until it appeared in appellee's petition for rehearing!* IT WAS NOT MENTIONED IN APPELLEE'S TWO BRIEFS ON THE ORIGINAL HEARING IN THIS COURT!

On the taking of testimony before the referee it was stipulated that all the specifications should be considered in evidence, that they might be referred to by counsel on argument, but that they need not be copied *UNLESS counsel desired to read some part of them which he wanted to call attention to.* The stipulation (in part) is as follows (Tr. p. 266, fol. 288):

"It is agreed that those specifications, in part or in whole, may be referred to by counsel on argument in this case, and they may be admitted in evidence, *but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to.*"

Then at the same moment and *pursuant to that stipulation* counsel for appellee read in evidence the very portion of the specifications containing,

among other things, the provision that the contractor should not assign or sublet the work in whole or in part and also that he should not either legally or equitably assign any of the moneys payable under the contract or his claim thereto unless with consent of the Board of Public Works (Tr. pp. 268, 269).

Under this stipulation and in this state of the case it was the privilege, at least, of counsel to have inserted the alleged additional evidence *if he desired* “to call attention to” it, because it was the letter and spirit of the stipulation that whatever counsel wanted “to call attention to” should be copied into the record! Counsel for appellee neglected to do this, then or at any subsequent stage of the proceedings, did not include nor attempt to include the alleged evidence in the statement of proceedings and testimony which counsel for appellee stipulated should be settled and allowed by the court (Tr. p. 273), and which contains a statement *approved by appellee* (Tr. p. 212) in words as follows:

“That *all of the testimony concerning the alleged assignment* of the fourth progress payment on the Fourth and Kentucky streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the referee, is as follows, to wit:” (r. p. 212, fol. 238.)

Nor did appellee include the alleged evidence in its praecipe as to the transcript filed March 3, 1912 (Tr. p. 6).

The record was filed May 14, 1913, and the printed transcript July 1, 1913. Over *four months* thereafter (November 11, 1913) appellee, taking the right to close the argument, which really belonged to appellant, filed its second, *and the final*, brief in the cause, in this court.

During all this time no hint was made by appellee, not a word said, written or printed, concerning any alleged omission in the record!

Appellee filed *two briefs*, therefore, after the point in question was presented in appellants' opening briefs, both on the negative of the very proposition, without suggesting any omission in the record or finding fault with the record in any particular!

Hence, it is fair to infer appellee did not rely on the alleged omitted evidence nor desire to call it to the court's attention, and to conclude that there are no special circumstances appearing in favor of its application, and that the court should not take notice thereof; *hence*, that the petition should be denied.

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## IX.

### PETITION FOR REHEARING WITHOUT MERIT.

There is, also, *no merit* in appellee's application for permission to amend the record nor in appellee's petition for a rehearing because, if the application were granted and the alleged evidence could



be produced, it would avail the appellee nothing, for the reason that the legal aspect of the case would not thereby be changed in any particular.

Appellee's argument (brief, pp. 7, 8) proceeds upon the theory that the legal maxim "*expressio unius est exclusio alterius*" is applicable to the case at bar. In support of this contention reference is made to the case of *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341.

Admitting for the sake of argument (but not as a fact) that the alleged omission in the record is a part of the contract, the *Burnett* case, nevertheless, is not in point. In the *Burnett* case the provision against assignment is accompanied *in the same sentence* by the statement of what the board may do in case the provision be violated. In the case at bar, the provisions which appellee contends should be inserted in the record do not accompany and are not directly connected with the language prohibiting the assignment by contractor of moneys payable under the contract or his claim thereto. On the contrary the specifications which appellee desires to have inserted appear to apply generally to the whole contract and to the breach of any of its conditions. But the alleged specifications themselves *carefully provide against their being construed as exclusive* by the condition in the second paragraph thereof, as appearing in page six of appellee's petition, that the right to declare the contract terminated shall reside in the board

“*whether any alternative right is provided or not*”! (Appellee’s Brief, p. 6).

In the Burnett case the city was held, also, to have waived its right to notify the contractor to discontinue work by permitting him to continue after notice and bringing the fund into court and consenting to its distribution. In the case at bar the board had no notice or knowledge of the attempted assignment to the appellee and never gave its consent (Tr. p. 146) and a mandatory injunction was issued to bring the fund into court (Tr. p. 116)!

In *Strauss v. Yeager* (Indiana, 1911), the plaintiff sued upon a contract for the purchase of land to recover an installment of the purchase price. The contract contained a provision, relating to remedies, to the effect that either party in case of failure to perform by the other, might enforce specific performance or recover damages for the default. The question arose whether the maxim “*Expressio Unius est exclusio alterius*” applied to the provisions of the contract relating to the remedies so as to limit the plaintiff to an action for specific performance or damages as provided in the contract and so as to prevent his suing on the contract to recover the purchase price. It was held that the maxim did not apply. The court said:

“The reason for this rule is stated in 2 Lewis’ Sutherland Statutory Construction (2d Ed.), Paragraph 491, as follows: ‘*Expressio unius est exclusio alterius*. This maxim, like

all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusion; but otherwise, the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act.' \* \* \*

"We do not feel justified in extending the application of this maxim to a subject where it has not been applied so far as we are able to ascertain, and especially so as the reason of the rule does not seem to justify such application."

Strauss v. Yeager, 93 N. E. (Indiana), pp. 881, 882.

Applying this precedent to the argument made by appellee in its brief, it will be observed that the alleged provision of the contract in the case at bar relating to remedies is wholly *general, not creative*, nor in derogation of any existing law or other provision of the contract and *expressly*, by its terms, *provides* that the right to declare the contract terminated shall not be construed to be exclusive by reserving that right "*whether any alternative right is provided for or not*"!

Therefore the maxim would not apply to such a contract as this even if it contained the provision alleged to have been omitted from the record, nor would the case of Burnett v. Mayor be in point.



Wherefore, it appearing that appellee's argument, just hereinabove mentioned, is not well taken, and it being the only argument in the petition other than a re-argument of the case, the petition should be denied.

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## X.

### ANSWER TO APPELLEE'S RE-ARGUMENT OF THE CASE.

Appellee devotes the last twenty pages of his printed brief entirely to re-argument of the cause.

But error of law is not "*briefly*" nor "*distinctly*", nor at all stated as one of the grounds of the petition (see Rule 29).

Appellants' counsel have carefully perused this argument and examined the authorities cited therein and in the opinion of the court. Counsel for appellant are not tempted to reargue the case, being satisfied that the conclusions of the court in its opinion and the reasons given therefor are correct.

Appellants desire to note that the provision of the contract in the case at bar against assignment of the contract by the contractor's claim thereto, are separately stated, both with equal force, under the same general sub-head and in the same general language, in the contract. Although in the same general portion, or sub-head, of the specifications these provisions are in separate paragraphs. The first appears on page 268 and the second on page 269 of the transcript. Thus the *explicit* covenant

of the contracting parties to prevent any assignment whatever of moneys payable under the contract or any claim thereto, apart from and in addition to their likewise *explicit* covenant prohibiting assignment of the work itself, is clearly denoted and emphasized!

And thus the distinction by *inference* which appellee seeks to draw between provisions prohibiting assignments of the contract and of moneys payable under it is impossible to be drawn concerning this particular contract, because in this particular contract the provisions are so plainly stated as not to leave any room for inference!

For convenience the two provisions are here given:

“SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.” (Tr. p. 268.)

\* \* \* \* \*

“No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.”  
(Tr. p. 269.)

Thus the two inhibitions, the one against assignment of the contract for personal services or work,

essentially unassignable, and the other against assignment of the moneys payable under the contract or the contractor's claim thereto, are placed *by the particular contract in the case at bar*, upon like footing.

The provision against assignment is not as to one only, nor as to both jointly, but is as to *each*. Nor is language of prohibition used as to one which is not used *also* as to the other!

Here are plain, unequivocal, *unlimited* prohibitions upon assignment of the work, *also* of moneys payable under the contract, *also* of the contractor's claim to moneys payable under the contract, *both* legally and equitably!

A more unlimited purpose to *absolutely prohibit* assignments could hardly be expressed in language. What more would it seem necessary to add, what other words necessary to use, to express an *unlimited* purpose to prohibit? *Obviously nothing more is required.*

Then, certainly, what is argued in the petition for rehearing concerning cases where the court is "able to discern a limited purpose, in case of a breach of the provision against assignment", or concerning the assignment of executory contracts, is of no persuasive moment, not being in point.

Therefore, it is clear that no other conclusion than that already reached is possible in this case.



Wherefore a rehearing should be denied.

3 Cyc. 213; *note* 14;

Black Hills B. Co. v. Middle West F. I. Co.,  
141 N. W. 358.

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## XI.

### APPELLEE'S MISQUOTATION FROM THE RECORD CORRECTED.

Attention is also respectfully called to the fact that in quoting from the record the clause of the contract in question relating to the non-assignment of "moneys payable", and so forth, on page 16 of its brief, appellee *omitted* to quote that part of the clause which refers to the contractor's "*claim*" to such "moneys payable". The words "OR HIS CLAIM THERETO" are omitted (see transcript, page 137).

As appellee's argument is directed to this point, the omission is important to be noted!

The prohibitory clauses are, therefore, quoted in full hereinabove.

Even without these words, *certainly when the omission is supplied*, appellee's argument as to the city's motives is not in point! As was said in the case of *City of Omaha v. Standard Oil Co.*, 55 Neb. 337 (quoted in the opinion):

"But it is needless for us to speculate on the motives for the city's action."

## XII.

## THE RIGHT OF THE MATTER.

The proposition that solemn and explicit agreements in writing between individuals inhibiting assignments or in other respects will be upheld and enforced in law and in equity and binding upon the parties and all who deal with them in reference to the contract is not surprising or novel.

It is the principle of decision in the case of *Burck v. Taylor* (152 U. S., Sup. 649), although counsel seems not to apprehend it, and its statement and enforcement in this case is, we think *according to the right of the matter*.

Appellants, therefore, pray that the petition for a rehearing be denied.

San Francisco, California,

April 17, 1914.

Respectfully submitted,

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COMPANY  
(a corporation), Bankrupt,

*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-  
CISCO (a corporation),

*Appellee.*

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APPELLEE'S BRIEF ON PETITION FOR A REHEARING.

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## Statement.

On March 9, 1914, the decree of the District Court herein was reversed on the ground that a certain provision of the specifications annexed to the contract between the Board of Public Works of the City and County of San Francisco and Metropolis Construction Company made void the assignment of the fourth progress payment by the company to the Portuguese-American Bank, appellee.

This Court, in holding the assignment void under the provision referred to, said:

“We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of payments.”

At the time it rendered its opinion, this Court had before it only the provision referred to, and did not have before it that portion of the specifications in which the provision appears.

On April 6, 1914, appellee filed its petition for a rehearing, setting forth therein, as a first reason, facts which had caused the omission from the transcript of record, of that portion of the specifications containing the provision relating to assignments; and as a second reason, that the decisions cited by counsel for appellants and relied upon by the Court do not support the conclusion that an assignment without consent is *void* and that its invalidity may be set up by a stranger to the contract.

On April 28, 1914, appellee filed a petition and motion for certiorari for diminution of the record for the purpose of having incorporated therein that portion of the specifications known as “General Provisions”, containing the provision against assignments without consent, in support of the first ground stated for rehearing.

On May 4, 1914, after argument by counsel for appellants and appellee, this Court granted the



petition and motion for certiorari, and in accordance with the order and award thereon a supplemental transcript of record containing the above mentioned "General Provisions" has been certified, printed and filed herein.

A consideration of the "General Provisions" set out in full in the supplemental transcript, will explain why the point upon which the decision herein was reversed was not raised by appellants in the Court below, and why appellants have made such strenuous efforts to keep the matter out of the record.

Appellants filed a brief in opposition to the appellee's petition for a rehearing, but as it presents nothing new, and consists almost entirely of argument against allowing appellee to amend the record, we will pass immediately to the arguments in support of the petition.

This brief will be divided into two parts: the first treating of the materiality of the new matter found in the "General Provisions" in the supplemental transcript of record; and the second treating of the validity of the assignment.

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## I.

### **MATERIALITY OF THE "GENERAL PROVISIONS".**

On pages 14 and 15 of the supplemental transcript of record, under the heading SUB-CONTRACT,

is the provision against sub-letting and assignment without the consent of the Board of Public Works. For convenience we subjoin it:

“SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless

with the like consent of the Board of Public Works.”

As a part of the same “General Provisions”, page 24 of the supplemental transcript, we find the following:

“TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract.”

These two provisions must be read together to determine what the intent of the parties was in placing the provision against assignment in the specifications annexed to the contract.



Upon a consideration of the "General Provisions", two main points are presented:

(a) An assignment of payments without consent was at most merely a breach of a condition of the contract, which could be taken advantage of only by the Board of Public Works.

(b) The provision against assignment of payments without consent, is a purely collateral condition.

(a)

**An assignment of payments without consent was at most merely a breach of a condition of the contract, which could be taken advantage of only by the Board of Public Works.**

Failure to comply with any of the conditions on the part of the contractor *shall be deemed a breach of contract, and the Board of Public Works shall have the right to declare the contract terminated.* (Supp. Tr. p. 24.)

Here is a clear and direct declaration in the instrument itself of how a breach of any condition thereof will be viewed by the other contracting party. Nowhere in the entire instrument is there a word to the effect that an assignment without consent shall be void or deemed void. Even if the language terminated here, the case would fall squarely within the exception approved in *Hobbs v. McLean*, 117 U. S. 567, and *Burck v. Taylor*, 152 U. S. 634.

But the stipulation does not terminate here. It goes on, and provides *how* the *Board of Public*

*Works* may terminate the contract. It may do so by *resolution* and service of a copy thereof on the contractor.

Here we find not only a *specific right reserved*, but the *specific party named who shall exercise that right*.

But this is not all. The specific penalty to be incurred in case of a termination as provided is set forth. The contractor shall immediately remove all his property not used in the work, shall forfeit all money due to him under the contract, and shall be liable jointly with his sureties for all expense and damage to the city by reason of his failure to complete the contract.

While appellee maintains that the opinion in *Burck v. Taylor* will not bear the construction placed upon it by this Court, yet in the light of this new matter now in the record the question of the construction to be placed on that opinion becomes entirely immaterial. The above provisions of the contract by clear implication reserve to the Board of Public Works alone the right to take advantage of a breach of its conditions.

In *Hobbs v. McLean* (supra), Section 3737 of the Revised Statutes was under consideration, it is as follows:

“No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred,

so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.”

Here the provision against transfer is stronger than in the case before the Court in that no mention is made of consent. In other respects it closely resembles the provision under consideration: it states what the result of a transfer will be, and also reserves to the United States any alternative remedies for breach of contract.

In commenting upon this provision of the Revised Statutes, the Court in *Burck v. Taylor*, at page 648, lay down the rule in these words:

“By the section quoted not only was a transfer of the contract prohibited, but also the result of such a forbidden transfer declared. In terms it was said that any ‘such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned.’ *Expressio unius est exclusio alterius*. The express declaration that so far as the United States are concerned, a transfer shall work an annulment of the contract, carried by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute. The Government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as



we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.

It is familiar law that not every contract in contravention of the terms of a statute is void and the courts will search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. *Harris v. Runnels*, 53 U. S., 12 How. 79; *Miller v. Ammon*, 145 U. S. 421; *Panghorn v. Westlake*, 36 Iowa 546.

It was in pursuance of this line of thought that the Court in *Hobbs v. McLean*, ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. \* \* \*

In the case of

*Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341,

the facts are almost identical with those in the case before the Court. The contract there provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the Board of Public Works, to be signified by endorsement on the contract, and that for a violation of this provision the board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against

subsequent creditors giving notice under the lien law. The Court held (pp. 352-353):

“The assignment was not void, even as against the city, but voidable *pro tanto* only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution.”

The provisions of the contract before the Court *do not* declare that an assignment without consent *shall be void*.

The only provision is that such an assignment shall be *deemed a breach of the contract*. If the Board of Public Works does not desire to take advantage of the usual remedy for breach of contract,—a suit for damages,—it *may* avail itself of the remedy provided, namely, declare the contract terminated and compel the contractor to remove from the vicinity all his property, and enforce against him the penalties enumerated.

The point we desire to emphasize especially is this: the remedy is reserved to the *Board of Public Works*, and it must *act* in the matter by adopting a *resolution* declaring the contract terminated. So long, therefore, as the city makes no complaint,

third parties cannot be heard to urge the objection that a formal consent has not been obtained. (*Burnett v. Jersey City*, supra.) The assignee is not forbidden to take title. The prohibition is simply this: You (the contractor) shall not assign without our (Board of Public Works) consent: if you do, you will be deemed to have broken your contract with the city, and in addition to the usual remedies against you for a breach of contract, we will have the right to terminate this contract, order you from the job, forfeit what money is coming to you, and hold you and your sureties liable for all expense and damage caused the city by your failure to complete the work.

Therefore, as this provision against assignment without consent was beyond all question a matter between the contractor and the Board of Public Works alone, and concerned no one else, our next inquiry is: Did the Board of Public Works, or the city, invoke the remedy provided?

If not, then appellee is unquestionably entitled, as between it and appellants, to the possession of the fourth progress payment.

Neither the Board of Public Works nor the City and County of San Francisco, nor any officer, agent nor department thereof, has or asserts any claim to the fourth progressive payment, by either claiming the warrant therefor, or the proceeds of said warrant, declared to have been earned by and payable to the contractor, *before* it was assigned to the



Portuguese-American Bank, appellee herein, as part security for \$30,000.00 then loaned by the appellee to the contractor.

It will be noted that the provisions before the Court require no formal consent. In this the case is stronger than that of *Burnett v. Jersey City* (supra), where the contract required a consent by endorsement on the contract.

(1) Paragraph VII of the amended bill of complaint (Tr. p. 12) expressly declares:

“ \* \* \* that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of six thousand eight hundred thirty and eighty-five one hundredths (\$6,830.85) dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said six thousand eight hundred thirty and eighty-five one hundredths (\$6,830.85) dollars, is not immediately delivered by defendant Boyle to said defendant trustee is that there exists some doubt in the mind of defendant Boyle as to whether said trustee or complainant or said defendant bank is the one rightfully entitled thereto.”

And paragraph IX of said bill of complaint (Tr. p. 15) expressly states:

“That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said

Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein.”

(2) The amended return to the order to show cause and answer of Auditor Boyle (Tr. p. 67) expressly declares:

“ \* \* \* and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder.”

(3) The answer of appellant John Daniel, trustee (Tr. p. 79), expressly admits each and every allegation of paragraphs VII and IX of the bill of complaint as amended.

(4) The report of the referee (Tr. p. 147) contains this finding:

“The Auditor makes no claim on his own account or on account of the city to the demand in controversy, and the city makes no claim thereto.”

(5) Mandamus and injunction of the District Court ordered the Auditor to allow, approve and deliver to the defendant John Daniel, as trustee, to abide the result of the action, the proceeds to be distributed to whomsoever shall be lawfully entitled. (Tr. pp. 115-116.)

It requires no authority to show that this is a complete waiver by the city: the waiver of the breach of any condition by the contractor is involved by necessary implication in the express dec-

laration by the Auditor that neither he nor the city makes any claim to the fourth progress payment.

Again the facts square with those of *Burnett v. Mayor and Aldermen of Jersey City* (supra):

“But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution.” (pp. 352-353.)

All of which goes to show that the position of appellant Welles in the lower Court, that an assignment or sub-contract without consent was not void, but only a breach of contract, was legally sound. Until the appeal, no claim was made that the assignment to the appellee was *void* for lack of consent by the city. Appellant's position in the Court below is illustrated by the admission or stipulation on page 271 of the Transcript.

“Mr. HEGGERTY. Will you admit that the assignment of the sub-contract by the Metropolis Construction Co. to Mr. Welles, the complainant in this action, was not consented to by the Board of Public Works?”

Mr. FROST. I will admit this, that there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also however admitted that Mr. Welles acted as a sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone



book, and he had his sign, 'Paul I. Welles' as the sub-contractor on the job."

The same law certainly applied to the sub-contract of Mr. Welles as to the assignment of the bank. If a formal consent was required for the latter, it was equally required for the former. Yet appellant considered knowledge of the Board of Public Works and lack of concealment by Mr. Welles a sufficient waiver of the condition by the city. This admission likewise concedes the validity of the sub-letting without consent. It is a familiar principle of law that a *void act cannot be ratified*.

(b)

**The provision against assignment of payments without consent is a purely collateral condition.**

(1) The stipulation in this contract (Supp. Tr. p. 24) is:

"TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated."

A condition is

"an agreement or stipulation in regard to some uncertain future event, not of the essential nature of the transaction, but annexed to it by the parties, providing for a change or modifica-

tion of their legal relations upon its occurrence; a clause in an agreement which has for its object to suspend, to rescind, or to modify the principal obligation.”

8 *Cyc.*, 555, 556.

A condition is created by inserting the word “condition” in the agreement.

8 *Cyc.*, 556 (note 99).

A “condition” can be imposed only by the grantor or owner, and in the absence of a limitation *he alone* can take advantage of a “condition”. It is not for the benefit of strangers and they cannot take advantage of it. See

8 *Cyc.*, 556 (note 99).

(2) The intention of the parties must control, and that intention is to be gathered from the whole instrument, and not from detached portions of it.

9 *Cyc.*, 579.

The instrument before the Court (“General Provisions”), besides containing the express word “conditions” with reference to its stipulations, shows on its face a limited and subsidiary purpose of the city in placing therein the condition against assignments without consent.

In the first place, the contract itself (Tr. p. 25) contains absolutely no reference to the matter of assignment. Moreover, it refers to the specifications attached merely with reference to work and

materials, and the manner of making progressive payments.

Secondly, the "General Provisions" do not contain anything about the progressive payments. They are provided for in another part of the specifications, headed "Payments" and the provisions regarding them are set out in transcript, at pages 255-256:

"In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.

\* \* \* \* \*

"Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.

Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

Here no reference whatever is made prohibiting, restricting or referring to the assignment of these progressive payments when earned.

In accordance with this progress payment provision, the Board of Public Works, on December 5, 1910, ordered the fourth progressive payment to be made to the contractor by resolution (Tr. pp. 256-257) as follows:



“Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.”

Thirdly, the Charter of the City and County of San Francisco [which by stipulation (Tr. pp. 269-270) may be referred to on argument in this Court] contains no provision requiring or permitting the incorporation of a provision against assignment of payments in contracts by the Board of Public Works.

Fourthly, the “General Provisions” are part of the specifications attached to the contract, and ordinarily no one would think of looking among them to find a stipulation going to the root of the contract itself. The rule of “*noscitur a sociis*” would seem appropriately applicable to the condition forbidding assignment without consent. The specifications are referred to for the manner of doing the work, quality of materials, etc. The provision on assignment is immediately preceded and followed by stipulations imposed upon the contractor by the Board of Public Works relating to the performance

of the work, materials, measurements, sanitation, patents and inspection.

Lastly, the requirements for obtaining consent (Supp. Tr. p. 14) show that the object was to maintain a standard of responsibility in the performance of the work.

The only conclusion which can be drawn from the considerations is that the condition requiring consent to an assignment was purely subsidiary, collateral to the objects and purposes of the contract, and was inserted for the benefit of the Board of Public Works as an aid to its supervision and control of the work.

A collateral *covenant restraining assignment* will not be enforced in equity when it appears on the face of the contract that the prohibition to assign is not the main purpose of the contract, but merely collateral to its principal objects.

In *Griggs v. Landis*, 21 N. J. Eq. pp. 510-511, the Court states the rule as follows:

“But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect.”

*A fortiori*, a subsidiary or collateral *condition* will not be thus enforced.

We respectfully submit that the new matter brought before the Court by supplemental transcript fully sustains the conclusions of the referee and decree of the District Court.

This matter, which was before the lower Court under stipulation (Tr. pp. 266, 267 and 268), was omitted from the first transcript of record under the peculiar and very exceptional circumstances set forth in appellee's petition for rehearing and motion for certiorari for diminution of the record herein.

Irrespective of any error claimed by appellee, in the opinion of the Court reversing the decision in this case, the entirely new phase presented entitles appellee to a rehearing.

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## II.

### VALIDITY OF THE ASSIGNMENT.

This case was reversed upon the point that an assignment of payments without the consent of the Board of Public Works was *void*.

Appellee respectfully submits that the Court erred in holding the assignment void.

Now, it is clear that as between the assignee of the contractor and the *other party* to the contract, the former gets no rights which are enforceable against the latter without his consent if the contract or the law requires the latter's consent to the



assignment. Hence, in a case of this kind it is immaterial whether the assignment is termed void or unenforceable, because the infirmity is equally available as a defense. For this reason, the result being the same in either case, it is unnecessary to make a distinction between void and voidable.

But, when the rights of third parties against the contractor are involved, and no objection to the assignment has been made by the other party to the contract, but he stands ready to pay to the party entitled, a different case is presented and it becomes very important to distinguish between assignments which are *void*, that is *mere nullities*, and assignments which are *voidable*, that is *unenforceable* against the *other party* to the contract *without his consent*.

29 A. & E. Ency. Law, 1067 (2nd Ed.).

An assignment without consent is *not* made *void* by the contract. If the contract declared that such an assignment would *be void*, under the general rule the word would be construed to mean *voidable*.

29 A. & E. Ency. Law, 1070 (2nd Ed.).

“A stranger may take advantage of a void act, but not so of a voidable one.”

*Id.*, p. 1067.

In cases where this point was directly involved the Courts have been careful to maintain the distinction.

Though an assignment without consent may not be binding on the vendor, where the contract of sale

provided against assignment without the consent of the vendor, still it is specifically enforceable in equity by the assignee against the original vendee.

*Sproull v. Miles*, 82 Ark. 455; 102 S. W. 204.

There is a wide difference to be observed between provisions forbidding an assignment of executory contract involving the personal skill and responsibility of the contractor without consent, and those forbidding an assignment of moneys payable under the contract, without consent.

The first are of the very essence of contracts for personal service, and, in the absence of express covenant, will be implied by law. The same rule must, obviously, apply to the case of parties claiming moneys by virtue of an assignment of such contracts, while they remain *executory*, and which moneys can be earned only by the performance of the work. This principle of law is well illustrated by the following quotations from *Burck v. Taylor* (152 U. S. pp. 649, 650):

“It is unnecessary to hold that the contractor might not be personally bound upon his promise *made before the performance of the contract* to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise it would be an independent promise on his part, it would not let the promisee *into an interest in the contract*. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; that contract remain-



ing all the time the property of the contractor, subject to disposal by and with the consent to the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. *This was while the contract was executory and before the work was done*, and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, *before the work was done* Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. *The contract was still executory: nothing had been earned by Schnell, and nothing was due to him.*" (Italics ours.)

And at pages 652, 653, we read:

"It is true that in that assignment it was stipulated that the profits were 'to be divided as the interests of the parties appear under the contract, or to their heirs or assigns.' If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the state and had made profits thereby, it may be that this plaintiff after giving notice



against assignment of the money after it is earned would run counter to the policy of the law, and should be positive, clear and entirely incapable of a liberal construction in favor of the creditor.

The provision of the specifications in this case is that the contractor

“shall not either legally or equitably assign any of the moneys payable under this contract or his claim thereto unless with like consent of the board of public works” (p. 137 Tr.).

But the Charter (Art. VI, Chap. I, Sec. 21) ordains that any contract may provide for progressive payments, not to exceed *seventy-five per cent.* of labor done and material furnished up to the time they are made.

The contract (Tr. pp. 26 and 135-136) provides for these progressive payments.

The Board of Public Works on December 5, 1910, passed a resolution (Tr. p. 256) in words and figures as follows:

“Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents (\$6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey.”

This action of the board changed the claim of the contractor under the contract into a debt, which then became a fixed obligation due to him from the city, and which belonged to the contractor to do with as it pleased. It ceased to be subject to any of the conditions of the contract.

It is to be observed also that the consent required is that of the *Board of Public Works*. Construction must be reasonable, and in favor of, rather than against, freedom of disposition. Now, the question arises, If it was the intent of the parties to prohibit the assignment of the moneys *after the work was done* and *after they were earned*, why should the consent of the *Board of Public Works* be required to an assignment made *after* the demand had left their hands, and *after* their *final action* thereon under the *charter*?

This question cannot be satisfactorily answered on the theory of appellants. No other reasonable construction can be placed upon this provision of the contract, than this: That any assignment of moneys *before* they were earned and ordered paid by the Board of Public Works, would require the consent of that Board.

The distinction between the forbidden assignment of a contract, or of moneys to be earned by the performance of the work thereunder, and the assignment of moneys already earned by performance, is clearly brought out in *Snyder v. City of New York*, 74 N. Y. App. Div. 421.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commissioner of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under that contract was assigned to plaintiff without such consent, and an action was brought against the City of New York. The first point made by the city was that no cause of action vested in plaintiff as against defendant, as there could be no assignment without consent.

The Court held:

"The clause in question is a restriction solely upon the assignment of the *contract as such* and not of moneys earned thereunder and which the city is bound to pay" (p. 426).

It was of the essence of the contract under consideration in *Burck v. Taylor*, that no interest in the contract should be capable of assignment without consent. Schnell purported to assign to plaintiff's assignor *an interest in the contract*. No consent was had to this assignment. Neither Schnell nor plaintiff's assignor, nor plaintiff, performed any work under the contract. It was held that plaintiff acquired no interest in the contract as against the defendant Taylor, who had been *substituted* in place of the original contractor, Schnell, and who had *performed the work*. If the



contractor was unable to carry out the contract, the state would have the undoubted right to have it carried out by a substituted party. This right would be impaired if the contractor could assign the contract without consent so as to give the assignee a claim to any interest therein; for if he could do so, a prior assignment might be asserted to deprive the substituted party of his compensation, and this right to secure a substituted contractor would be interfered with.

The cases of *Fortunato v. Patton*, 147 N. Y. 277; *Hackett v. Campbell*, 10 App. Div. N. Y. 523, affirmed in 159 N. Y. 537, and *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341, directly pass upon provisions in municipal contracts forbidding assignment of moneys due under such contracts, and they decide that such provisions are for the benefit of the city only.

*Hackett v. Campbell*, supra, concerns a provision, contained in a contract between the board of education of the City of Yonkers and a contractor, to the effect that no assignment of any portion of the amount due upon the contract should be made without the consent, first had in writing, of a committee of the board of education.

It was held that the provision was one solely for the benefit of the board of education and its sole function was to prevent claims from being asserted against the city in the absence of its consent.

The contest was between a person who had an order for part of a fund, which was held to be an equitable assignment of moneys due the contractor, and various lien claimants. Consent to the assignment had not been obtained. It was held that the assignee was entitled to priority.

The following excerpt is taken from the decision, page 525, 10 App. Div. N. Y.:

“The appeal is based upon the provision of the contract quoted, the appellants’ contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent’s order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.

The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (*supra*) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten*.”

Furthermore, it is to be noted that in no case has such an assignment been held *void*. Even in the case of *Burck v. Taylor*, which involved an assignment of a part of the contract itself, the Court, in its conclusion, states:

“In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the state; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the state vested in the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of plaintiff’s claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell made to plaintiff or plaintiff’s assignor.”

Here the Court enumerate matters which are entirely incompatible with the idea that they intended to hold that such an assignment would be *absolutely void*.

Likewise, in the following cases the Court held that such provisions must be specially pleaded in defense; even in a suit against the original party to the contract:

*Burke v. Mayor of N. Y.*, 7 N. Y. App. Div. 128;

*Episcopo v. Mayor of N. Y.*, 35 Miscel. N. Y. 623 (affirmed in 80 App. Div. 627).



The statement in *Devlin v. Mayor etc. of New York*, 63 N. Y. 8, that

“Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations”,

while *obiter dictum*, is not applicable to the case at bar for the contract in case at bar does not in terms declare that assignees shall not succeed to any rights in virtue of it. In that case the Court held that the contract under consideration *was assignable* and permitted the assignee to recover against the *city*.

Likewise the statement from *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488,

“A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable”,

while *obiter dictum*, can not be said to mean that an assignment without consent, is *void*.

These statements merely affirm the right of a party to insert in his contract a provision against assignability so that an assignee shall acquire no right of action against him without his consent. Furthermore, in each case, the assignee sued the *other contracting party*, the City of New York in one case, and Delaware County in the other.

The decisions in the cases of *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, *Murphy v. City of Plattsmouth*, 78 Neb. 163, *Suburban Electric Light Co. v. Town of Hempstead*, 38 App. Div. N. Y. 355, are all based upon the proposition that an assignment of the *contract itself* in violation of a provision against assignment will not entitle the *assignee* to recover against the *other contracting party*.

*Mueller v. Northwestern University*, 195 Ill. 236, concerns a contract for furnishing marble for a building belonging to the university and which contained a provision against assignment in the following words:

“That the contractor shall not sell, assign, transfer or set over this contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and any such sale, assignment or transfer without such written consent of the architects first obtained thereto shall be absolutely null and void.”

The plaintiff claimed as assignee of the moneys due the contractor and sued the university, *the other party to the contract*, after it had, in ignorance of plaintiff's claim, made a partial settlement with the contractor. The Court decided that, upon the facts of the case, plaintiff had no assignment, and that if he had, it was in violation of the contract provision and that he could not recover against the *university*.

In *La Rue v. Groezinger*, 84 Cal. 281, the plaintiff sued to recover upon a contract made by defendant with plaintiff's assignor, by the terms of which defendant agreed to purchase grapes raised by plaintiff's assignor upon certain property. Plaintiff purchased the property and took an assignment of the contract. Defendant refused to buy any grapes from plaintiff, claiming that the contract was not assignable. The Court held that the contract *was assignable*.

It will be noted that in all these cases the contest was between the *assignee* of one party and the *other party to the contract*.

There only remains to be considered the case of *Deffenbaugh v. Foster*, 40 Ind. 382.

This case is much cited to the point that an assignment which is forbidden without consent is *void*. The facts were these:

A contract for street improvement provided that it should not be assigned without consent of the common council.

The contractor had a precept issued in his name against Foster, a property holder. Deffenbaugh sued Foster for the amount of the precept.

Deffenbaugh filed an amended complaint, but failed to allege an *assignment* to him *either with or without consent*. It does not appear that there was an assignment. A demurrer was interposed and sustained. On appeal it was held that this ruling was right.



Hence, the question was one of pleading,—no assignment whatever was alleged and plaintiff showed no right to sue. The effect of an assignment without consent was, therefore, not involved, and that part of the opinion is dictum. The Court also decided that the provision was for the protection of the City and property-owner against improper and unfaithful substitutes for the original contractor. While this was also dictum it shows that when the Court used the word *void*, it did not necessarily mean absolute nullity, since on its view of the case the infirmity was equally available to Foster as a defense whether the assignment was void or voidable.

Our point is, that such prohibitions do not make the assignments *void*, but merely *unenforceable* if the party in whose favor they exist sees fit to invoke them. We find no authority to the contrary.

It is to be remembered that in this case Mr. Welles is not claiming an interest in the contract; whatever rights he may have to the demand flow solely from Section 1184 of the Code of Civil Procedure.

Therefore, if the assignment to the Bank was not *void*, it was good and enforceable unless the defense of want of consent was set up by the city.

The case seems to fall squarely within the facts and decision of *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341 (*supra*).

“The assignment was not void, even as against the city, but voidable *pro tanto* only. The board of works could not deprive the

assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution" (pp. 352-353).

With reference to the position of appellant Welles under Section 1184 of the Code of Civil Procedure, this Court, in the decision reversing the decree herein, assumes that one of the grounds, if not the principal ground, of embodying the provision in the contract was to afford subcontractors a better opportunity to secure payment.

This cannot be so, for the following reasons: In the first place no such purpose appears from the contract itself and the Court cannot deprive appellee of its rights by reading such an intent into the contract; in the second place the charter of this city and county gives the Board of Public Works no authority to insert any such provisions in its contracts; in the third place no such protection was necessary, as under Section 1184 the subcontractor could have given his notice at any time from the *commencement of his work* and until the contractor parted with his right to the money; and in the fourth place the sub-contractor is amply protected by the bond required of the contractor on



municipal work under Act 2895, General Laws of the State of California. The opinion of Judge Dietrich is a clear and succinct statement of the case (pp. 184-185 Tr.):

“My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want of vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally



or specifically advised of the rights or interests of the plaintiff.”

To conclude, a vital distinction exists between provisions against assigning contracts, or interests therein, and provisions against assigning moneys payable thereunder after performance of the work.

No covenant is necessary to prevent assignment of an interest in the contract without the consent of the owner. Non-assignability without consent is engrafted by the law upon every contract involving personal skill and responsibility. An assignment without consent of an interest in such a contract, carries with it no rights against the owner; and, likewise, carries with it no interest in the fruits of the contract when the contractor has failed to perform any work or earn any money under it. That’s *Burck v. Taylor*.

But no such prohibition is implied against the assignability of moneys earned by performance, and which are a debt due from the owner to the contractor. Such a prohibition would be contrary to common right, and should never be inferred. The intention to create it should be clear and compelling. No such intention appears from the language of this contract. A provision to the effect that the contractor *shall not assign any of the moneys payable under the contract* without the consent of the Board of Public Works, has been held, in every well considered opinion, and in *every case in which the construction was necessary to the*

*decision*, to prohibit the assignment of *any interest in the contract*, including only those moneys which are *inseparable from the performance* of the contract, and which can have no existence apart from the doing of the work under it. This, we submit, is the *ratio decidendi* in all the well considered cases, cited in this petition, including *Burck v. Taylor*.

We are unable to find any authority for the *dicta* in the decisions cited to support the ruling of this Court. They stand alone. A careful reading of the opinions shows that they purport to stand on *Burck v. Taylor*, but that the point of the decision in *Burck v. Taylor* has been misconceived. It is a significant fact that no case prior to *Burck v. Taylor* enunciates the doctrine applied in the case at bar. This fact, in itself, would seem sufficient reason for a rehearing, especially in view of the fact that this Court has not had the benefit of the research of counsel.

Appellee respectfully submits that it is entitled to a rehearing of this case.

Dated, San Francisco,

May 22, 1914.

Respectfully submitted,

GEO. A. KNIGHT,

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No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES and JOHN DANIEL,  
Trustee of METROPOLIS CONSTRUCTION  
COMPANY (a corporation), bankrupt,

*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF  
SAN FRANCISCO (a corporation),

*Appellee.*

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## APPELLANTS' REPLY TO APPELLEE'S BRIEF ON PETITION FOR A REHEARING.

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By leave of court, appellants respectfully make reply to the brief of counsel for appellee on petition for rehearing, filed May 25, 1914, as follows:

### I.

#### THE PARAGRAPH CONCERNING TERMINATION CONTAINS A SAVING CLAUSE.

Counsel in a cause at bar who leaves out of his discussion an important fact which would, or might, if touched upon, turn the argument against him,



or alter materially the premises upon which argument is predicated, seems blind to the dangers that beset him.

Counsel's argument, beginning on page 6, is that an assignment of the payments under the contract without consent was *at most* merely a breach of a condition of the contract which the contractor was required to *perform*, and that the contractor's failure or neglect to *perform* it could be taken advantage of only by termination of the contract, leaving the assignee to enjoy the fruits of his prohibited assignment. Counsel relies in the argument upon the general provision of the contract giving the city the right to terminate the contract if the contractor should neglect or fail to *perform* any of its conditions (by him required to be performed, of course) as appears on page 24 of the supplemental transcript of record. And counsel relies as a matter of law to sustain this position, upon the theory that the provision in question applies to the matter of assignment and that it is exclusive, and gives rise to a condition of the contract to which the court can and must apply the maxim: "*Expressio unius est exclusio alterius*," so as to exclude any other legal consequence (than termination) from flowing from a contractor's unauthorized assignment, and, also, because counsel can see in it as a matter of *legal construction*, a purpose to consider the right of the city and the contractor, *and nobody else*. Then counsel proceeds to build his argument upon this premise, *without calling attention to or in any way noticing*

that part of the clause in question which distinctly negatives any intention on the part of the contracting parties to make the provision exclusive or to in any way limit the otherwise legal effect of a failure to obtain consent. The clause in question contains the following words:

“WHETHER ANY ALTERNATIVE RIGHT IS PROVIDED OR NOT.”

The full paragraph is as follows:

“Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right *whether any alternative right is provided or not*, to declare the contract terminated.”

So, the right to terminate the contract by its very terms, is not to exclude any other right (provided by law or otherwise), which the parties or their assigns may have or to which the contract may give rise. *Which saving clause is an important fact that counsel omits to consider in his argument.* Therefore, in the very beginning, by a mere reading into the argument the saving clause which counsel omits to mention; the whole theory of his argument, wherein he believes he sees a purpose on the part of the contracting parties to limit the effect of failure to obtain consent to a possible termination of the contract by the city, falls for lack of a premise upon which to predicate such an argument or theory.

Therefore, the petition for rehearing should be denied.

## II.

## CASE OF BURNETT v. MAYOR DISTINGUISHED.

In further support of his argument, counsel refers to the case of *Burnett v. Mayor & Aldermen of Jersey City*, 31, N. J. Eq. 341, and argues that the facts in that case are almost identical with those in the case before the court.

But the facts in the *Burnett* case, although somewhat similar, were *not* identical, nor *almost* identical, with the facts in the case at bar. And the point of dissimilarity between the facts in the *Burnett* case and the facts in the case at bar appears exactly with respect to the provisions of the contracts in that case and in this, as to the consequences incident upon failure to obtain consent. Said dissimilarity consists in this, that in the *Burnett* case in the *same paragraph and as a part of* the provision prohibiting assignment without consent (which paragraph does not contain any *saving clause* and is so drawn that the clause relating to termination *could apply to nothing else in the contract*) it was provided that a violation of the provision against assignment should give the city the right to notify the contractor to discontinue work; whereas in the case at bar the provision prohibiting assignment, *both legally and equitably*, stands by itself and alone; and the provision giving the right to the city to terminate the contract is in most general terms and *does not refer to the matter of consent at all*; but, on the contrary, stands by itself, under a separate heading, relating to termi-



nation of the contract for the failure of the *contractor* to *perform* the conditions of the contract. In the case at bar it is a general clause referring to the *performance* of the work under the contract and to conditions to be *performed* by the contractor, under the contract, and *which contains a saving clause protecting and preserving the existence of every "alternative right"*, so that the right to terminate shall not be construed to be exclusive.

Therefore, in the two cases the contracts not being similar, but quite *dissimilar*, in respect of the remedies provided in case of assignment without consent (one being limited to termination, and the other expressly negating any such limitation) the Burnett case is not in point.

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### III.

#### GENERAL PARAGRAPH CONCERNING TERMINATION NOT TO BE CONSTRUED AS EXCLUSIVE OR AS A LIMITATION.

Furthermore, even without the saving clause, (against the remedy of termination being construed as exclusive) the provision for the remedy of *termination*, appearing in this contract, is a general, and not a specific provision and, *therefore*, should not be construed to be exclusive. In such case the maxim "*Expressio Unius*" is not applicable.

In *Strauss v. Yeager* (Indiana, 1911) the plaintiff sued upon a contract for the purchase of land

to recover an installment of the purchase price. The contract contained a provision, relating to remedies, to the effect that either party in case of failure to perform by the other, might enforce specific performance or recover damages for the default. The question arose whether the maxim "*Expressio unius est exclusio alterius*" applied to the provisions of the contract relating to the remedies so as to limit the plaintiff to an action for specific performance or damages as provided in the contract and so as to prevent his suing on the contract to recover the purchase price. It was held that the maxim did not apply. The court said:

"The reason for this rule is stated in 2 Lewis' Sutherland Statutory Construction (2d Ed.), Paragraph 491, as follows: '*Expressio unius est exclusio alterius*. This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusion; but otherwise, the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act.' \* \* \*

"We do not feel justified in extending the application of this maxim to a subject where it has not been applied so far as we are able to ascertain, and especially so as the reason of the rule does not seem to justify such application."

Strauss v. Yeager, 93 N. E. (Indiana), pp. 881, 882.

Applying this precedent to the argument made by appellee in its brief, it will be observed that the alleged provision of the contract in the case at bar relating to remedies is wholly *general, not creative*, nor in derogation of any existing law or other provision of the contract and *expressly*, by its terms, *provides* that the right to declare the contract terminated shall not be construed to be exclusive by reserving that right “*whether any alternative right is provided for or not*”!

Therefore the maxim would not apply to such a contract as this.

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#### IV.

##### PARAGRAPH CONCERNING TERMINATION NOT APPLICABLE TO QUESTION OF NON-ASSIGNABILITY OF PAYMENTS.

Moreover, the provisions on page 24 of the supplemental transcript relating to termination of the contract cannot be applied to the facts in the case at bar at all (and were not intended so to apply) because said provisions look to the termination of the contract in case of *the contractor's neglect or failure to perform*, only, the plain purpose thereof being to conserve the active performance of the positive conditions of the contract by the contractor, with reference to the work itself, which are numerous apparent in the supplemental transcript.

Now, there is no *neglect or failure to perform* any positive condition of the contract involved in the



contractor's making an assignment without obtaining consent of the Board of Public Works. The provisions of the contract with reference to consent were entirely *negative* (8 Cyc. 558) and not provisions which the contractor was required actively to *perform* or in reference to which any *act* at all was *required* of him; and consequently were not conditions of the contract for which a *neglect or failure to perform* would entitle the city to terminate the contract and take possession of the work.

Obviously the contractor could execute a paper purporting to be an assignment without the knowledge of the Board of Works, as was done in the case at bar. *Of what avail, then, would be the right to terminate the contract for the breach of the provision against assignment without consent, if such purported assignment be held legally or equitably valid, and the Board of Works did not know anything about it?*

So, either this provision requiring consent could have no operative effect whatever (if the clause concerning termination be applied) and might as well have been left out of the contract; or it is a self executing condition precedent, making an attempted assignment, without consent first obtained, absolutely null and void, legally and equitably.

On the contrary, the provision that the contractor shall not assign without consent has nothing to do with *performance* of the conditions of the contract by the contractor, but is an absolute inhibition, neg-

ative in character, upon the contractor's making any assignment at all, the effect of which is to make the contract unassignable legally or equitably and to deprive him in the first instance of any right at all to assign the contract or any of the payments ~~there~~ under or his claim thereto, either legally or equitably, "unless" that right shall be subsequently conferred upon him by new agreement, if and when he shall have first *asked and obtained* consent; i. e. the effect is to make the contract and payments absolutely unassignable in law and in equity, without any condition whatever which the contractor is *required* to *perform* concerning it. In other words, it was not a part of the contractor's duties of *performance* under the contract either to assign his payments or to obtain consent to any assignment. The city was not interested in making that an *act* or *condition* of *performance* required of the contractor, *because* the contract and the payments had been made absolutely unassignable, legally and equitably, by agreement of the parties appearing elsewhere in the contract.

It was a *condition precedent*, so far as the contractor's right to assign payments was concerned, because it called for the performance of some act, namely, *consent* obtained, before any assignment, legal or equitable, could take effect (8 Cyc. 558). It was, therefore, *self executing*, and not a condition imposed upon the contractor, which it could be said he was required to *perform*.

Consequently the paragraph concerning failure or neglect of the contractor to *perform* the *conditions* of the contract could have no reference to the subject of non-assignability.

Under such circumstances his attempted assignment without first having obtained consent was an attempt to transfer to the Portuguese-American Bank a right which he himself did not have, the result of which right, logically and legally is a *nullity*.

Therefore, the *performance* of the contract or its conditions, required of the contractor, has nothing whatever to do with the question of assignment now before the court; and hence the new matter concerning the *additional* remedy of *termination* for failure to *perform*, now imported into the record for the first time on petition for rehearing, is not material and has no bearing.

The conclusion reached by the court in its opinion, that the contract and payments were unassignable either legally or equitably, is the correct one, therefore. Hence, the petition for rehearing should be denied.

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## V.

### OPINION OF CALIFORNIA DISTRICT COURT OF APPEAL.

The District Court of Appeal of the State of California on May twenty-ninth, 1913, in construing a contract made by the City and County of San Francisco, containing a provision such as is con-



tained in the contract in the case at bar (*an exactly similar contract*) was of the opinion that an assignment made in violation of the express provision of the contract not to assign payments without consent of the Board of Public Works was absolutely *null and void*.

The following is quoted from the opinion of the court in that case which accords fully with the decision of this court in the case at bar:

“There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy.” \* \* \*

“The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company.”

Butler v. San Francisco Gas & Electric Co.,  
May 29, 1913, Civil No. 1053, Vol. 16,  
C. A. D., pages 946, 949, 953.

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## VI.

### APPELLEE'S ARGUMENT BEGS QUESTION CONCERNING EFFECT OF PROHIBITION OF BOTH LEGAL AND EQUITABLE ARGUMENTS.

Appellants are not tempted to re-argue the case. It is desired to point out, however, that in citing authorities (from which counsel in his brief quotes copiously), the argument of counsel for appellee is,

in a vital respect, open to the charge of "begging the question"; because in his argument in discussing the authorities counsel does not compare the facts of the case under discussion with the facts of the case at bar.

In its opinion this court examined and discussed the cases referred to by counsel in his brief on petition for rehearing and brushed them aside as not in point, for this very reason.

The court says:

*"Those cases are not in point for the reason that here the prohibition is against both the legal and equitable assignment of the money."*

This is the point which counsel persistently ignores, the question which counsel always begs in his discussion, namely, that the prohibition in the case at bar is against the equitable as well as the legal assignment and also that it is against not only the assignment of the payments, but also against the assignment of the contractor's *claim* to the payments, thus making the contract and payments, by distinct agreement of the parties, absolutely unassignable in law and in equity.

And thus the distinction by *inference* which appellee seeks to draw between provisions prohibiting assignments of the contract and of moneys payable under it is impossible to be drawn concerning this particular contract, because in this particular contract the provisions are so plainly stated as not to leave any room for inference.

For convenience the two provisions are here given:

“SUB-CONTRACTS. The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works.” (Tr. p. 268.)

\* \* \* \* \*

“No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.” (Tr. p. 269.)

Thus the two inhibitions, the one against assignment of the contract for personal services or work, essentially unassignable, and the other against assignment of the moneys payable under the contract or the contractor's claim thereto, are placed *by the particular contract in the case at bar*, upon like footing.

The provision against assignment is not as to one only, nor as to both jointly, but is as to *each*. Nor is language of prohibition used as to one which is not used *also* as to the other.

Here are plain, unequivocal, *unlimited* prohibitions upon assignment of the work, *also* of moneys payable under the contract, *also* of the contractor's claim to moneys payable under the contract, *both* legally and equitably.



A more unlimited purpose to *absolutely prohibit* assignments could hardly be expressed in language. IF IT BE POSSIBLE TO MAKE A CONTRACT AND THE PAYMENTS THEREUNDER ABSOLUTELY UNASSIGNABLE BY ANY WORDS THE PARTIES MAY USE, THEN THIS HAS BEEN DONE IN THE CASE AT BAR, BECAUSE STRONGER LANGUAGE COULD NOT WELL BE IMAGINED.

What more would it seem necessary to add, what other words necessary to use, to express an *unlimited* purpose to prohibit? *Obviously nothing more is required.*

Then, certainly, what is argued in the petition for rehearing concerning cases where the court is "able to discern a limited purpose, in case of a breach of the provision against assignment", or concerning the assignment of executory contracts, or of payments where the provisions against assignment without consent are limited, or only against legal and not equitable assignments, is of no persuasive moment, not being in point.

The contract and its payments (otherwise assignable if you please) were made absolutely *unassignable* legally and equitably by agreement of the parties, so that nothing existed which could be assigned *unless* (the contract uses the word "*unless*") the parties should bring it into existence as an assignable thing by subsequent mutual agreement, namely, application for permission to assign or assignment by one *consented to* by the other.

## VII.

**GENERAL PROVISIONS CONCERNING TERMINATION SHOULD NOT NOW BE CONSIDERED, BECAUSE NOT HERETOFORE RELIED ON OR CALLED TO NOTICE.**

A reference to appellant's reply to appellee's petition for rehearing, filed May 17, 1914, in this court and cause will disclose the piecemeal method in which appellees have brought to the attention of this court the matters which they now urge as reasons for a rehearing.

*The record discloses affirmatively that the general provisions relating to termination of contract printed on page 24 of the supplemental transcript of the record were brought to the attention of this court, for the first time in a printed petition for rehearing filed by the appellee in this court on the seventh day of April, 1914, and that said provisions were never at all called to the attention of the court below.*

The reference now to the provision of the contract concerning termination probably is a mere afterthought, because *said provision was never mentioned by anyone connected with the case at any time until it appeared in appellee's petition for rehearing. It was not mentioned in appellee's two briefs on the original hearing in this court.*

On the taking of testimony before the referee it was stipulated that all the specifications should be considered in evidence, and that they might be referred to by counsel on argument, but that they

need not be copied "*unless*" counsel desired to read some part of them which he wanted "*to call attention to*". The stipulation (in part) is as follows (Tr. p. 266, fol. 288):

"It is agreed that those specifications, in part or in whole, may be referred to by counsel on argument in this case, and they may be admitted in evidence, *but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to.*"

Then at the same moment and *pursuant to that stipulation* counsel for appellee read in evidence the very portion of the specifications containing, among other things, the provision that the contractor should not assign or sublet the work in whole or in part and also that he should not either legally or equitably assign any of the moneys payable under the contract or his claim thereto unless with consent of the Board of Public Works (Tr. pp. 268, 269), without referring at all, then or at any subsequent time, to the clause concerning termination.

Under this stipulation and in this state of the case it was the privilege, at least, of counsel to have inserted the general provision relating to termination of the contract *if he desired* "*to call attention to*" it, because it was the letter and spirit of the stipulation that whatever counsel wanted "*to call attention to*" should be copied into the record. HOW ELSE COULD THE COURT NOTICE IT? Counsel for appellee neglected to do this, *then or at any subsequent stage of the proceedings*, did not include



nor attempt to include the alleged evidence in the statement of proceedings and testimony which counsel for appellee stipulated should be settled and allowed by the court (Tr. p. 273) and which contains a statement *approved by appellee* (Tr. p. 212) in words as follows:

“That all of the testimony concerning the alleged assignment of the fourth progress payment on the Fourth and Kentucky streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the referee, is as follows, to wit:” (Tr. p. 212, fol. 238.)

Nor did appellee include the alleged provision in its praecipe as to the transcript filed March 3, 1912 (Tr. p. 6).

The record was filed May 14, 1913, and the printed transcript July 1, 1913. Over *four months* thereafter (November 11, 1913) appellee, taking the right to close the argument, which really belonged to appellant, filed its second, *and the final* brief in the cause, in this court.

During all this time no hint was made by appellee, not a word said, written or printed, concerning the now alleged provision concerning termination of the contract for non-performance.

Appellee filed *two briefs*, therefore, after the question was presented in appellants' opening briefs, both on the negative of the proposition, and waited until the cause had been decided in this court and an opinion written and filed, *without*

*ever having made referencse or called attention of the court below or of this court to the said provision relating to termination of the contract in case of failure on the part of the contractor to perform.*

Hence, it is fair to infer appellee did not rely on the alleged omitted evidence nor desire to call it to the court's attention, and to conclude that the petition should be denied.

Although there is no merit in the petition for rehearing, with or without the matter now for the first time brought to the attention of this court on page 24 of the supplemental transcript of record, nevertheless counsel's failure to call attention to said provision of the contract on the original hearing of this cause in this court (where the point was brought to his attention and counsel given full opportunity to do so) is good and sufficient reason why the petition for rehearing should be denied.

Reese Folding Machine Co. v. Fenwick, 72  
C. C. A. 43-44.

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## VIII.

### DECISION IS ACCORDING TO SUBSTANTIAL JUSTICE.

The proposition that solemn and explicit agreements in writing between individuals inhibiting assignments or in other respects will be upheld and enforced in law and in equity and binding upon the

parties and all who deal with them in reference to the contract is not surprising or novel.

It is the principle of decision in the case of *Burck v. Taylor* (152 U. S. Sup. 649), and its statement and enforcement in this case is, we think *according to the right of the matter*.

Appellants, therefore, pray that the petition for a rehearing be denied.

San Francisco, California,

June 3, 1914.

Respectfully submitted,

A. F. MORRISON,

P. F. DUNNE,

W. I. BROBECK,

GAVIN McNAB,

B. M. AIKINS,

MILTON J. GREEN,

*Counsel for Appellant, John Daniel,  
Trustee, Etc.*

C. A. S. FROST,

*Counsel for Appellant, Paul I. Welles.*

(The italics in the foregoing brief are supplied by counsel.)





No. 2273

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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PAUL I. WELLES and JOHN DANIEL, Trustee  
of METROPOLIS CONSTRUCTION COMPANY (a  
corporation), Bankrupt,

*Appellants,*

VS.

PORTUGUESE-AMERICAN BANK OF SAN FRAN-  
CISCO (a corporation),

*Appellee.*

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## APPELLEE'S PETITION FOR A REHEARING.

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*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Appellee respectfully petitions for a rehearing  
of this cause, and assigns therefor the following  
grounds:

First. Accident and surprise which prevented  
appellee from bringing up before this Court a full  
and fair record on the point upon which the decree  
herein has been reversed.

Second. Novelty and unexpected importance of the point upon which the decree herein has been reversed, fairly entitling appellee to have the cause reopened for further argument.

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#### FIRST GROUND.

To a clear understanding of the first ground urged by appellee for a rehearing, and a proper appreciation of its merits, a brief statement of the position of appellants, with reference to the point that the moneys due under the contract were not assignable without the consent of the Board of Public Works, is indispensable.

Some time prior to February 2, 1912, counsel for appellant Paul I. Welles raised the objection, rather vaguely and indirectly, that an assignment would not be inferred by the Court because, among other reasons, the contract provided that the contractor should not assign moneys payable under it without the consent of the Board of Public Works, and that the Board's consent was not obtained.

On February 2, 1912, counsel for appellee filed the opening brief on motion for confirmation of the Referee's report; and, assuming that counsel for Mr. Welles might attack the validity of the assignment for lack of consent, briefed this point to some extent.

Then, on February 15, 1912, on the same hearing, counsel for Mr. Welles, in reply, pointed out



that counsel for appellee were in error in assuming that such was his contention, in the following words:

“It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank wasted its discussion of that point, on pages 4, 5 and 6 of the brief.” (Referring to appellee’s said brief of February 2, 1912.)

The above language is clear when it is understood that the two important and vital questions before the Court were those of assignment and priority. Appellants’ contention was that an assignment without consent would at most be a breach of contract, and that an assignment would not be inferred under such circumstances. In other words, they argued that the Court should not infer that the contractor intended to violate his agreement.

The point, therefore, that there could be no assignment of the fourth progress payment without the consent of the Board of Public Works was not presented in its present form; and this, in fact, was the last heard of it, until the hearing of the exceptions to the final report of the Referee came on before the District Court. At that time counsel for Mr. Welles again disavowed the theory that the rights of the contractor were not capable of assignment on December 6, 1910. This statement was elicited by a finding in the Referee’s report.

The brief on this hearing is dated August 17, 1912, and is entitled "Argument of Complainant on hearing of his Exceptions to Report of Examiner, filed July 16, 1912; and his reply to said Examiner's Conclusions of Law". In this brief, pages 8 and 9, we find the following language:

"Complainant's argument and position are not fairly stated in the examiner's report, on this point. It is not contended that the rights of the construction company, whatever they were, were not capable of assignment on December 6, 1910. The contention is rather as follows: "

Then follow three reasons why the Court will not *infer* an assignment, or *construe* the transaction to be an assignment.

With this last reference to the matter, the point was never again mentioned directly or indirectly, then or thereafter; and was never urged in its present form until the litigation reached this Court on appeal, and until *after the transcript had been filed in this Court*.

Rule 11 of this Court provides:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. \* \* \* When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

No assignment of error was taken by appellants to the conclusion of the Referee, or the conclusion of the District Court, that the provision against assigning moneys payable under the contract was solely for the protection of the city and can only be invoked by the city, and that such an assignment is not void because of the failure to obtain consent of the city.

Counsel for appellants drew up their exceptions and specifications of error with great particularity, touching every possible point directly and carefully, except the point on which this case has been reversed. This is also potent evidence of the manner in which this point was viewed by appellants until the filing of the opening brief on appeal.

The importance of the foregoing statement becomes apparent, when considered in connection with the fact that if the point had been made prior to the filing of appellants' brief on this appeal, appellee could have prepared the record to meet it.

The *entire* "*specifications*" annexed to the contract between the Board of Works and the Construction Company were in evidence before the Referee and the District Judge, under stipulation that they could be referred to without the necessity of copying them (p. 266 Tr.). These so-called "Specifications" are headed "General Provisions" in the contract, and consist of 20 pages of matter printed in imitation of typewriting. In these "General Provisions", at page 11, occurs the paragraph forbidding the contractor to assign any of



the moneys payable under the contract without consent of the Board of Public Works.

But, at page 18 of the same "Specifications", the following provisions occur:

"All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination upon the contract.

Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work, all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work and he shall forfeit all sums due to him under the contract and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract."

In making up the record on appeal, appellee was bound by new Equity Rules 75 and 76 to omit what was not deemed material, and for that reason did not encumber the transcript with the whole con-

tract between the City and the Construction Company.

This omission of the contract from the record was brought about, as above set forth, by the admission of counsel for Mr. Welles in the Court below, that the rights of the Construction Company, whatever they were, *were assignable* on December 6, 1910, but that such assignment, if made, would constitute a breach of contract.

It will readily be understood, on reading the above portions of the "General Provisions", why counsel for Mr. Welles *did not claim* in the Court below that the progress payments due to the company could not be assigned by it without the consent of the Board of Works.

These omitted portions specifically provide what will be the result, or penalty, of a breach of any condition of the contract. This Court has not had the benefit of the light of these provisions in deciding this appeal,—provisions which have a decisive bearing on the point on which the case has been reversed, as shown by the following authorities.

If from the whole contract, the Court is able to discern a limited purpose on the part of the contracting parties, in case of a breach of the provision against assignment, then the rule declared in *Hobbs v. McLean*, 117 U. S. 567, and *Burck v. Taylor*, 152 U. S. 635, must prevail.

This rule is stated in *Burck v. Taylor* to be:

"*Expressio unius est exclusio alterius.* The express declaration that so far as the United

States are concerned, a transfer shall work an annulment of the contract, carried, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute."

In *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341, a contract between the city and contractor provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the Board of Public Works, to be signified by endorsement on the contract, and that for a violation of this provision the Board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against subsequent creditors giving notice under the lien law. The Court held (pp. 352-353):

"The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion.



But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution.”

In *Griggs v. Landis*, 21 N. J. Eq. pp. 510-511, the Court states the rule as follows:

“But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect.”

There are innumerable cases to the same effect, but we quote from the above merely to show that upon a fair record the decree of the District Court should be affirmed.

We desire to call particular attention to the fact that counsel at that time, knew and admitted the exact intent and legal effect of the provision of this contract prohibiting assignment of moneys payable thereunder, as settled beyond controversy by these decisions.

As the record can be made to show these facts, we respectfully submit that appellee is, in furtherance of justice, entitled to a rehearing and to an order permitting it to prepare and file in this Court a supplemental transcript embodying

the whole contract and specifications under which the demand in suit became due. Otherwise, appellee, having in fact an assignment in *good faith*, will be technically deprived of its rights, and solely because of an accidental omission from the record in this Court of certain portions of the "General Provisions", which were in evidence in the Court below. There, counsel for complainant Welles admitted that the company could assign its rights on December 6, 1910, because the record there showed that it could do so; here, counsel deny that the company could assign those rights, because the record here fails to show that it could do so.

Furthermore, a reversal of the decree, through the accidental omission referred to, would be particularly drastic and unjust to the appellee, in as much as other litigation, involving two other demands against the city for over \$31,000.00, is pending, which would undoubtedly be unfavorably influenced by the authority of this decision.

The necessity of an amendment to the record did not become apparent until the decision of this Court was rendered. Appellee believed, and had every reasonable ground to believe, that the point urged on the appeal would not be considered by this Court in the absence of a specific exception reserved to the finding of the Referee before the District Court. No such exception was taken, and the record contains none. As we have stated, the only exception taken was in argument; *and that exception was to a conclusion of the Referee in*

*intimating that counsel for Mr. Welles had questioned the assignability of the demand, when he in fact admitted its assignability.*

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New Equity Rule 76 provides as follows:

“In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.

If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by supplemental transcript.”

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## SECOND GROUND.

We respectfully submit that this case should be reopened for further argument on the point upon which the decree has been reversed. Up to the time when the appellants took advantage of the deficiencies in the record to raise and press the point in argument before this Court, there was no dispute,—as we have shown above,—about the assignability of the demand. The point having never been raised in the Court below, was not given any particular consideration by counsel. The three



points exhaustively considered were: Did the transaction constitute an assignment? Was the fourth progress payment due to the company from the city on December 5, 1910? And, was the minute order of December 12, 1911, the *law of the case*?

When the point was raised on this appeal for the first time, counsel for appellants had ample opportunity to prepare for its presentation, but counsel for appellee were at a serious disadvantage because of the shortness of the time at their disposal; the unexpected position assumed by appellants, and inability to foresee the action of this Court.

Under the circumstances it was only to be expected that the argument was not developed as it would have been under ordinary conditions of litigation.

In the first place, there is a difference to be observed between stipulations forbidding the assignment of the contract, and those forbidding the assignment of payments. The first are of the very essence of contracts for personal service, and, in the absence of express covenant, will be implied by law. The same rule must, obviously, apply to the case of parties claiming moneys by virtue of an assignment of such contracts, while they remain *executory*, and which moneys can be earned only by the performance of the work. This principle of law is well illustrated by the following quotations from *Burck v. Taylor* (152 U. S. pp. 649, 650):

“It is unnecessary to hold that the contractor might not be personally bound upon his prom-

ise made before the performance of the contract to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise it would be an independent promise on his part, it would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; that contract remaining all the time the property of the contractor, subject to disposal by and with the consent to the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. *This was while the contract was executory and before the work was done*, and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, *before the work was done* Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. *The contract was still exe-*



*cutory: nothing had been earned by Schnell, and nothing was due to him.*" (Italics ours.)

And at pages 652, 653, we read:

"It is true that in that assignment it was stipulated that the profits were 'to be divided as the interests of the parties appear under the contract, or to their heirs or assigns.' If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the state and had made profits thereby, it may be that this plaintiff after giving notice could have enforced both against Schnell and this defendant a one thirty-second of such profits, resting upon this stipulation for division among the parties or their assigns, but as Schnell *never earned any share in the profits* there is nothing upon which that stipulation can take effect. The profits which would have resulted if Schnell, with Taylor, Babcock & Co., had performed the contract might have been very different from that which did result from the performance of the contract by Taylor alone. It is a mistake to suppose that the profits to be derived from the performance of a contract, *as yet unexecuted*, are something separable from the performance—as a coupon is detachable from a bond—and can be set floating through the channels of commerce as a separate obligation. The profits are tied up in the contract to such an extent that the promise in respect to them becomes of value only when he who makes the promise *shall have earned the profits through the performance of the contract*. And when the contract, *being wholly executory*, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made



by the original contractor before the substitution.” (Italics ours.)

And again, at page 651, we read:

“We have thus far rested the non-assignability of this contract, or any interest therein, to plaintiff’s grantor upon the express stipulation of clause 26; but even in the absence of such a clause, it was not competent for Schnell, by his own act, and without the consent of the state, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of assignment without the consent of the other party.”

Hence, contracts calling for personal services are *essentially* unassignable without consent. All that the contractor may do is to parcel out the purely ministerial portions of the work and agree to pay therefor, personally. The covenant against assignment in such a case adds nothing to the legally implied prohibition.

Such was the case of *Burck v. Taylor*. The assignment was prohibited, not only by the contract, *but by the policy of the law itself*.

But when money has been *earned* under a contract, by the *performance of the work* by the contractor, or a specific part thereof to which the payment is apportioned, does the policy of the law forbid assignment of that money, which is then *beyond* the control of the Board of Public Works and a *debt* due from the city to the contractor? So far, our examination of the authorities has

not disclosed a case so holding, and, certainly on principle, there can be no such prohibition. On the contrary, when money is earned, and the relation of debtor and creditor has been established, as was the case here when the Board of Public Works *approved* the demand in suit and *ordered* its *payment*, the policy of the law is in favor of the freedom of the owner to dispose of the demand in any way he sees fit. No rights of the debtor under the contract can be disturbed, and any prohibition against assignment of the money after it is earned would run counter to the policy of the law, and should be positive, clear and entirely incapable of a liberal construction in favor of the creditor.

The provision of the contract in this case is that the contractor

“shall not either legally or equitably assign any of the moneys payable under this contract, unless with like consent of the board of public works” (p. 137 Tr.).

It is to be observed that the consent required is that of the *Board of Public Works*. Construction must be reasonable, and in favor of, rather than against, freedom of disposition. Now, the question arises, If it was the intent of the parties to prohibit the assignment of the moneys *after the work was done* and *after they were earned*, why should the consent of the *Board of Public Works* be required to an assignment made *after* the demand had left their hands, and *after* their *final action* thereon under the *charter*?

We submit that this question cannot be satisfactorily answered on the theory of appellants. No other reasonable construction can be placed upon this provision of the contract, than this: That any assignment of moneys *before* they were earned and ordered paid by the Board of Public Works, would require the consent of that Board.

The distinction between the forbidden assignment of a contract, or of moneys to be earned by the performance of the work thereunder, and the assignment of moneys already earned by performance, is clearly brought out in *Snyder v. City of New York*, 74 N. Y. App. Div. 421.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commissioner of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under that contract was assigned to plaintiff without such consent, and an action was brought against the City of New York. The first point made by the city was that no cause of action vested in plaintiff as against defendant, as there could be no assignment without consent.

The Court held:

"The clause in question is a restriction solely upon the assignment of the *contract as such* and not of moneys earned thereunder and which the city is bound to pay" (p. 426).



Moneys payable under the contract being construed to mean moneys *to be earned* by the performance of the contract, and inseparable from that performance.

This, we submit, is the proper construction, and the only rational construction which can be placed on the provision, without violating normal legal rights and the peculiar provisions of the contract before us.

It was of the essence of the contract under consideration in *Burck v. Taylor*, that no interest in the contract should be capable of assignment without consent. Schnell purported to assign to plaintiff's assignor *an interest in the contract*. No consent was had to this assignment. Neither Schnell nor plaintiff's assignor, nor plaintiff, performed any work under the contract. It was held that plaintiff acquired no interest in the contract as against the defendant Taylor, who had been *substituted* in place of the original contractor, Schnell, and who had *performed the work*. If the contractor was unable to carry out the contract, the state would have the undoubted right to have it carried out by a substituted party. This right would be impaired if the contractor could assign the contract without consent so as to give the assignee a claim to any interest therein; for if he could do so, a prior assignment might be asserted to deprive the substituted party of his compensation, and this right to secure a substituted contractor would be interfered with.

*Burck v. Taylor* decides that an assignment of an interest in the contract under consideration, without consent, was ineffectual, and not that a contractor cannot assign moneys that might become due him.

The cases of *Fortunato v. Patton*, 147 N. Y. 277; *Hackett v. Campbell*, 10 App. Div. N. Y. 523, affirmed in 159 N. Y. 537, and *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341, directly pass upon provisions in municipal contracts forbidding assignment of moneys due under such contracts, and they decide that such provisions are for the benefit of the city only.

*Hackett v. Campbell*, supra, concerns a provision, contained in a contract between the board of education of the City of Yonkers and a contractor, to the effect that no assignment of any portion of the amount due upon the contract should be made without the consent, first had in writing, of a committee of the board of education.

It was held that the provision was one solely for the benefit of the board of education and its sole function was to prevent claims from being asserted against the city in the absence of its consent.

The contest was between a person who had an order for part of a fund, which was held to be an equitable assignment of moneys due the contractor, and various lien claimants. Consent to the assign-

ment had not been obtained. It was held that the assignee was entitled to priority.

The following excerpt is taken from the decision, page 525, 10 App. Div. N. Y.:

“The appeal is based upon the provision of the contract quoted, the appellants’ contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent’s order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.

The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (*supra*) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten*.”

Furthermore, it is to be noted that in no case has such an assignment been held *void*. Even in the case of *Burck v. Taylor*, which involved an assignment of a part of the contract itself, the Court, in its conclusion, states:



“In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the state; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the state vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of plaintiff’s claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell made to plaintiff or plaintiff’s assignor.”

Here the Court enumerate matters which are entirely incompatible with the idea that such an assignment would be absolutely void.

Likewise, in the following cases the Court held that such provisions must be specially pleaded in defense; even in a suit against the original party to the contract:

*Burke v. Mayor of N. Y.*, 7 N. Y. App. Div. 128;

*Episcopo v. Mayor of N. Y.*, 35 Miscel. N. Y. 623 (affirmed in 80 App. Div. 627).

The statement in *Devlin v. Mayor etc. of New York*, 63 N. Y. 8, that

“Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall

succeed to any rights in virtue of it, or be bound by its obligations",

while obiter dictum, is not applicable to the case at bar for the contract in case at bar does not in terms declare that assignees shall not succeed to any rights in virtue of it. In that case the Court held that the contract under consideration was assignable and permitted the assignee to recover against the city.

Likewise the statement from *Delaware County v. Diebold Safe Co.*, 133 U. S. 473, 488,

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable",

while obiter dictum, can not be said to mean that an assignment without consent, is void.

These statements merely affirm the right of a party to insert in his contract a provision against assignability so that an assignee without consent shall acquire no right of action against him. Furthermore, in each case, the assignee sued the *other contracting party*, the City of New York in one case and Delaware County in the other.

The decisions in the cases of *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, *Murphy v. City of Plattsmouth*, 78 Neb. 163, *Suburban Electric Light Co. v. Town of Hempstead*, 38 App. Div. N. Y. 355, and *Deffenbaugh v. Foster*, 40 Ind. 382, are all based upon the proposition that an assignment of the

*contract itself* in violation of a provision against assignment will not entitle the assignee to recover against the other contracting party.

Except, in *Deffenbaugh v. Foster*, the defendants in all these cases were cities which had provisions against assignment inserted in their own contracts.

In *Deffenbaugh v. Foster*, supra, the plaintiff was the assignee of a contract for a street improvement which was assigned in violation of its provisions. He sued the property owner for the amount of the assessment. The Court decided that he could not recover and that the provision against assignment was to protect the city and the property owner against improper and unfaithful substitutes for the original contractor.

*Mueller v. Northwestern University*, 195 Ill. 236, concerns a contract for furnishing marble for a building belonging to the university and which contained a provision against assignment in the following words:

“That the contractor shall not sell, assign, transfer or set over this contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and any such sale, assignment or transfer without such written consent of the architects first obtained thereto shall be absolutely null and void.”

The plaintiff claimed as assignee of the moneys due the contractor and sued the university, *the other party to the contract*, after it had, in ignor-



ance of plaintiff's claim, made a partial settlement with the contractor. The Court decided that, upon the facts of the case, plaintiff had no assignment, and that if he had, it was in violation of the contract provision and that he could not recover against the university.

In *La Rue v. Groezinger*, 84 Cal. 281, the plaintiff sued to recover upon a contract made by defendant with plaintiff's assignor, by the terms of which defendant agreed to purchase grapes raised by plaintiff's assignor upon certain property. Plaintiff purchased the property and took an assignment of the contract. Defendant refused to buy any grapes from plaintiff, claiming that the contract was not assignable. The Court held that the contract was assignable.

Our point is, that such prohibitions do not make the assignments *void*, but merely *unenforceable* if the party in whose favor they exist sees fit to invoke them. They may be waived.

It is to be remembered that in this case Mr. Welles is not claiming an interest in the contract; whatever rights he may have to the demand flow solely from Section 1184 of the Code of Civil Procedure.

Therefore, if the assignment to the Bank was not *void*, it was good and enforceable until the defense of want of consent was set up by the city. Mr. Welles, in his complaint (p. 12 Tr.) alleges that neither the city nor any office, agent or depart-

ment thereof, made any claim to the demand or its proceeds. Auditor Boyle, in his amended return and answer (p. 67 Tr.) states

“that the city and county of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder.”

The Trustee in his answer (p. 79 Tr.) adopts and admits the allegations of the bill of complaint.

The money has been paid into Court to await the final determination of the rights of the respective parties.

The case seems to fall squarely within the facts and decision of *Burnett v. Mayor and Aldermen of Jersey City*, 31 N. J. Eq. 341 (supra).

“The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution” (pp. 352-353).

With reference to the position of appellant Welles under Section 1184 of the Code of Civil Procedure, this Court, in the decision reversing the

decree herein, assumes that one of the grounds, if not the principal ground, of embodying the provision in the contract was to afford subcontractors a better opportunity to secure payment.

This cannot be so, for the following reasons: In the first place no such purpose appears from the contract itself; in the second place the charter of this city and county gives the Board of Public Works no authority to insert any such provisions in its contracts; and in the third place no such protection was necessary, as under Section 1184 the subcontractor could have given his notice at any time from the *commencement of his work* and until the contractor parted with his right to the money. The opinion of Judge Dietrich is a clear and succinct statement of the case (pp. 184-185 Tr.):

“My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the



claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want or vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally or specifically advised of the rights or interests of the plaintiff."

To conclude, a vital distinction exists between provisions against assigning contracts, or interests therein, and provisions against assigning moneys payable thereunder after performance of the work.

No covenant is necessary to prevent assignment of an interest in the contract without the consent of the owner. Non-assignability without consent is engrafted by the law upon every contract involving personal skill and responsibility. An assignment without consent of an interest in such a contract, carries with it no rights against the owner; and, likewise, carries with it no interest in the fruits of the contract when the contractor has failed to perform or earn any money under it. That's *Burck v. Taylor*.

But no such prohibition is implied against the assignability of moneys earned by performance, and which are a debt due from the owner to the contractor. Such a prohibition would be contrary to common right, and should never be inferred. The intention to create it should be clear and compelling. No such intention appears from the language of this contract. A provision to the effect that the contractor *shall not assign any of the moneys payable under the contract* without the consent of the Board of Public Works, has been held, in every well considered opinion, and in *every case in which the construction was necessary to the decision*, to prohibit the assignment of *any interest in the contract*, including only those moneys which are *inseperable from the performance* of the contract, and which can have no existence apart from the doing of the work under it. This, we submit, is the *ratio decidendi* in all the well considered cases, cited in this petition, including *Burck v. Taylor*.

We are unable to find any authority for the *dicta* in the decisions cited to support the ruling of this Court. They stand alone. A careful reading of the opinions shows that they purport to stand on *Burck v. Taylor*, but that the point made in *Burck v. Taylor* has been misconceived. It is a significant fact that no case prior to *Burck v. Taylor* enunciates the doctrine applied in the case at bar. This fact, in itself, would seem sufficient reason for a re-examination, especially in view of the fact that this Court has not had the benefit of the research of counsel.

Appellee respectfully petitions for a rehearing of this case, and requests that this Court direct that, as provided in New Equity Rule 76, the omission of said "specifications" or "General Provisions" of said contract from the transcript be corrected by a supplemental transcript containing the whole of said contract and specifications in evidence in the Court below, or such portions thereof as may be deemed material to a determination on the merits of the point upon which the decree herein has been reversed.

San Francisco, California,

April 6, 1914.

Respectfully submitted,

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#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel in the foregoing case; that in my judgment the petition herein is well founded and is not interposed for delay.

CHAS. J. HEGGERTY,

*Of Counsel for Appellee  
and Petitioner.*



















